

EDITOR'S NOTE

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ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

No. 87-6177

JOHNNY PAUL PENRY,

Petitioner,

- v -

JAMES A. LYNAUGH,
Director, Texas Department
of Corrections,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF
IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI

Petitioner JOHNNY PAUL PENRY, by counsel, supplements his
pending petition for writ of certiorari with the following:

1. On June 22, 1988, the Court announced its decision in
Franklin v. Lynaugh (No. 87-5546). If the holding of the Court
in Franklin is the position taken by Justices O'Connor and
Blackmun in the concurring opinion -- as we believe it is -- then
Mr. Penry's case presents the very question which the concurring
opinion held "[the Court] would have to decide" when properly
presented. Franklin v. Lynaugh, slip op. at 3 (O'Connor, J.,
joined by Blackmun, J., concurring).

2. The question which concerned the concurring justices in
Franklin is whether Texas' special verdict questions might be
inadequate to permit the jury to give effect to its consideration
of the mitigating evidence in a particular case. If the
mitigating evidence is not relevant to one of the special verdict
questions, or if it has mitigating value beyond their scope, the
concurring justices believed that the jury would be precluded
from considering the evidence in the manner required under the
Eighth Amendment. As Justice O'Connor explained,

If . . . petitioner had introduced mitigating evidence
about his background or character or the circumstances
of the crime that was not relevant to the special

Supreme Court, U.S.
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JOSEPH R. SPANIOLO, JR.
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verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions the jury instructions would have provided the jury with no vehicle for expressing its 'reasoned moral response' to that evidence.

Id. It is in "such a case" that "we would have to decide whether the jury's inability to give effect to that evidence amounted to an Eighth Amendment violation." Id.

3. Mr. Penry's case is just such a case. The mitigating evidence in his case focused upon his mental retardation and the emotional and physical abuse he suffered as a child. He could not read or write, he never finished the first grade, and his emotional development was that of a child. He was beaten as a child and locked in a room for hours at a time without access to a toilet. He was in and out of a number of state schools. "One effect of his mental retardation was his inability to learn from his mistakes." Penry v. Lynaugh, 832 F.2d 915, 925 (5th Cir. 1987).

4. While in some respects Mr. Penry's mitigating evidence was relevant to both of the special verdict questions, in other respects it was not. And insofar as it was relevant, the mitigating evidence plainly "had relevance to [his] moral culpability beyond the scope of [those] questions," Franklin, supra, at 3 (emphasis supplied). With respect to the deliberateness question, Mr. Penry's mitigating evidence was at once relevant and irrelevant:

Having just found Penry guilty of an intentional killing, and rejecting his insanity defense, the answer to that issue was likely to be yes. Although some of Penry's mitigating evidence of mental retardation might come into play in considering deliberateness, a major thrust of the evidence on his background and child abuse, logically, does not.

832 F.2d at 925. As to whether Mr. Penry would be a continuing threat to society, his mitigating evidence "had relevance to [his] moral culpability beyond the scope of [that] question[]," Franklin, supra.

The mitigating evidence shows that Penry could not learn from his mistakes. That suggests an affirmative answer to the second question. What was the jury to do if it decided that Penry, because of retardation, arrested emotional development and a troubled youth, should not be executed? If anything, the evidence made


it more likely, not less likely, that the jury would answer the second question yes.

Id. (footnote omitted). While the evidence of retardation supported an affirmative answer to the second question, it also supported the view that Mr. Penry should not be executed, precisely because his retardation was a major factor contributing to his dangerous behavior. Yet the instructions "provided the jury with no vehicle for expressing its 'reasoned moral response' to that evidence," Franklin, supra, if it believed that Mr. Penry's retardation was a reason to impose life instead of death.

5. In the view of the concurring justices, therefore, Mr. Penry's case presents the grave constitutional question that was not presented by Franklin. Moreover, this question is not foreclosed by the opinion of the Franklin plurality, for the concurring justices did not join the rationale of the plurality, which embodied the broader view "that a State may constitutionally limit the ability of the sentencing authority to give effect to mitigating evidence relevant to a defendant's character or background or to the circumstances of the offense that mitigates against the death penalty." Franklin, supra, at 1 (concurring opinion). In these circumstances, the view of the concurring justices, rather than of the plurality, represents the holding of the Court. See Marks v. United States, 430 U.S. 188, 193 (1977) (when no single rationale supporting the result commands a majority of the Court, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds").

6. Franklin having expressly left open -- yet pointing to the need to decide -- the question presented squarely by the facts of Mr. Penry's case, certiorari should be granted.

Respectfully submitted


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Certificate of Service

I, Curtis C. Mason, a member in good standing of the Bar of the Court, hereby certify that the foregoing Supplemental Brief in Support of Petition for Writ of Certiorari has been served upon respondent by sending a copy, via first class mail, to his counsel, Jim Mattox, Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711, this 24th day of June 1988.

C. C. Mason
Curtis C. Mason

NO. _____

87-6177

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1987

JOHNNY PAUL PENRY,
Petitioner

V.

JAMES A. LYNAUGH, DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS
Respondent

Petition for Writ of Certiorari
To the United States Court
Of Appeals for the Fifth Circuit

APPENDIX A, B AND C

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ATTORNEY FOR PETITIONER

CORRECTED

PENRY v. LYNAUGH

669

Johnny Paul PENRY,
Petitioner-Appellant,

v.

James A. LYNAUGH, Director, Texas
Department of Corrections,
Respondent-Appellee.

No. 87-2466.

United States Court of Appeals,
Fifth Circuit.

Nov. 25, 1987.

Defendant convicted of murder and sentenced to death filed petition for habeas corpus. The United States District Court for the Eastern District of Texas, William M. Steger, J., denied the writ, and defendant appealed. The Court of Appeals, Reavley, Circuit Judge, held that: (1) defendant's confession and waiver of *Miranda* rights were voluntary; (2) defense had procedurally defaulted on issue of exclusion of one venireman for cause; and (3) although Texas capital sentencing procedure was arguably inconsistent with developing death penalty law in adequacy of jury's consideration of mitigating circumstances before imposition of death penalty, procedure had been expressly held constitutional by the United States Supreme Court.

Affirmed.

Garwood, Circuit Judge, filed concurring opinion.

1. Criminal Law §1213.8(8)

It is not cruel and unusual punishment to execute a mentally retarded person. U.S.C.A. Const.Amend. 8.

2. Habeas Corpus §45.1(4)

State had provided defendant convicted of murder with a full and fair opportunity for litigation of the claims that state limited his investigator's fees, that a police officer who testified at both suppression hearing and trial lied at suppression hearing, and that state failed to provide him with one of his previous confessions, and defendant failed to show what difference more investigator's fees or having his previous confession would have made; thus, defendant could not raise a Fourth Amendment claim of illegal arrest in his habeas corpus petition. U.S.C.A. Const.Amend. 4.

3. Criminal Law §517.2(2), 519(1)

Defendant convicted of murder who claimed his waiver of *Miranda* rights was not voluntary, based on his low intellect and inability to freely confess or waive his rights, failed to show any police misconduct which would taint confessions or waiver as required to find that confession was not "voluntary" within meaning of due process clause of Fourteenth Amendment. U.S. C.A. Const.Amend. 5, 14.

4. Habeas Corpus §45.3(1.40)

Habeas corpus petitioner was precluded, by procedural default, from consideration on the merits of whether exclusion of one venireman for cause was improper where, at trial, defense counsel originally objected to state's motion to exclude venireman from cause, but after a number of attempts at rehabilitation, counsel withdrew his objection and challenge for cause was granted.

5. Criminal Law §1208.1(5)

In the penalty phase of a capital case, a sentencing authority must not be precluded

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APPENDIX A

OPINION OF THE FIFTH CIRCUIT

ed from considering any or almost any mitigating evidence. U.S.C.A. Const. Amend. 8.

6. Criminal Law §1208.1(5)

Requirement arising out of United States Supreme Court decision in *Sumner v. Shuman* that sentencer not be precluded from "considering" any mitigating circumstance in capital case means that sentencer must not be precluded from listening to and acting upon any mitigating circumstance; jury may not be precluded from allowing evidence of mitigation to enter into its decision. U.S.C.A. Const. Amend. 8.

Appeals from the United States District Court for the Eastern District of Texas.

Before REAVLEY and GARWOOD, Circuit Judges.*

REAVLEY, Circuit Judge:

This is a collateral attack upon the death sentence by a Texas court of Johnny Paul Penry. With one exception all of the contentions advanced on Penry's behalf are easily rejected. The exceptional contention is that Texas law did not permit the jury to consider, and to apply, all of Penry's personal mitigating circumstances prior to reaching the verdict that mandated his death sentence. We are bound by superior authority to reject that contention, but we discuss the problem fully to demonstrate why it may merit further consideration.

* Due to his death on October 19, 1987, Judge Robert M. Hill did not participate in this

I.

On the morning of October 25, 1979, Pamela Carpenter was brutally beaten, raped, and stabbed with a pair of scissors in her own home in Livingston, Polk County, Texas. She died a few hours later, but she was able to relay a description of her assailant to the first police officer on the scene and to the doctor in the hospital.

The description led two local sheriff's deputies to suspect Penry. They went to the house of Penry's father, where Penry was staying. Penry denied any involvement but voluntarily agreed to go with the officers to the police station.

At the police station the officers and Penry were met by a number of other local law enforcement agents. They read Penry his *Miranda* rights and questioned him about a wound on his back. After being warned again, Penry signed a consent to search form. Everybody then went back to the Penry home to retrieve a shirt he had worn earlier that day.

Penry then accompanied the police officers to the scene of the crime. There Penry, for the first time, stated that he had "done it." He was immediately arrested, handcuffed, and read his rights again. He was brought back to the police station and taken before a magistrate. Penry was formally charged with capital murder. The magistrate read and questioned Penry about whether he understood his rights. Penry stated that he understood his rights and signed the warning forms.

Police Chief Bill Smith then questioned Penry after again warning him. Penry agreed to give a statement. Smith took the statement in notes and turned it over to

decision. The case is being decided by a quorum. 28 U.S.C. § 46(d).

his secretary to type. After the statement was typed, because Penry could not read, it was read to him in front of two non-police witnesses. That statement described the crime in detail, and Penry signed it.

Texas Ranger Cook took a second statement the following day. Again, the statement was read back to Penry in front of two non-police witnesses, and it contained the *Miranda* warnings and a statement that the rights were being waived. The second statement told of the crime in even more detail and contained confessions of Penry's previous crimes.

These two statements formed the heart of the prosecution against Penry. The statements were consistent with the other evidence, including proof that Penry had been at Ms. Carpenter's house once before, Ms. Carpenter's statement about being raped and stabbed, the bloody scissors found at the scene, and the position of the victim's clothing as described by the ambulance attendant. However, there was no physical evidence (blood, semen, fingerprints or hair samples) linking Penry to the scene of the crime.

At a competency hearing before trial, Penry was shown to have limited mental ability. He could not read or write, having never finished the first grade. His IQ indicated mild to moderate retardation. He had been in and out of a number of state schools. His relatives testified that he was beaten as a child and had behaved strangely as both a child and a teenager. Nevertheless, a jury found him competent to stand trial.

At the guilt/innocence phase of his trial, evidence of Penry's limited mental capacity was reintroduced. There was disagreement among the three testifying psychiatrists whether Penry was insane: the de-

fense psychiatrist opined that he was, but the state's two psychiatrists disagreed. There was also disagreement over the degree of Penry's mental limitation and the cause of the limitations. However, all of the psychiatrists agreed that Penry had mental limitations, whether caused by a birth trauma or by childhood environmental factors such as beatings and being locked in his room for extended periods of time. They also agreed that Penry's problems manifested themselves, among other ways, in an inability to learn from his mistakes.

The jury rejected Penry's insanity defense and found him guilty of capital murder. Tex. Penal Code Ann. § 19.03 (Vernon 1974). The jury then answered "yes" to all three "special issues," and Penry was sentenced to death. Tex. Crim. Proc. Code Ann. art. 37.071 (Vernon 1981 & Supp. 1987). The Texas Court of Criminal Appeals affirmed the conviction and sentence. *Penry v. State*, 691 S.W.2d 636 (Tex. Crim. App. 1985), cert. denied, 474 U.S. 1073, 106 S.Ct. 834, 88 L.Ed.2d 805 (1986).

II.

[1] Penry argues that it would be cruel and unusual punishment to execute a mentally retarded person such as himself. He cites *Ford v. Wainwright*, 477 U.S. 399, —, 106 S.Ct. 2595, 2600, 91 L.Ed.2d 335 (1986), for the proposition that "idiots and lunatics are not chargeable for their own acts." An identical claim has recently been rejected by this court. *Brogdon v. Butler*, 824 F.2d 338, 341 (5th Cir. 1987). Penry's claim is without merit.

[2] Penry raises a number of issues regarding his two confessions. He first claims that they should have been suppressed because they were the fruit of an

illegal arrest. A Fourth Amendment claim of illegal arrest is foreclosed in habeas if the state "provided an opportunity for full and fair litigation" of the claim. *Stone v. Powell*, 428 U.S. 465, 493-95, 96 S.Ct. 3037, 3052-53, 49 L.Ed.2d 1067 (1976). Recognizing the *Stone* bar, Penry argues that he did not have a "full and fair" suppression hearing. He claims that the state limited his investigator's fees, that a police officer who testified at both the suppression hearing and trial lied at the suppression hearing, and that the state failed to provide him with one of his previous confessions. Penry's claims are without merit. Penry does not point out what difference more investigator's fees, or having his previous confession, would have made. The police officer's testimony at the suppression hearing was not inconsistent with his trial testimony. We have made an "independent evaluation of the state court record" and are satisfied that Penry's "opportunity to contest the introduction of incriminating evidence resulting from his arrest was not circumscribed." *Billiot v. Maggio*, 694 F.2d 98, 100 (5th Cir.1982). *Stone* bars relitigation of the issue here.

[3] Penry also argues that his confession was involuntary and that he did not voluntarily waive his *Miranda* rights. Most of Penry's argument on both issues centers on his low intellect and inability to freely confess or waive his rights. However, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, — U.S. —, —, 107 S.Ct. 515, 522, 93 L.Ed.2d 473 (1986). Similarly, "*Miranda* protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment;

it goes no further than that." *Connelly*, 107 S.Ct. at 524. We have carefully examined the record, as is our duty, see *Miller v. Fenton*, 474 U.S. 104, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985) (ultimate question of voluntariness of confession subject to plenary review by federal habeas court), and can find no evidence of police misconduct that would taint the confessions or waiver of rights. Both the confession and waiver of *Miranda* rights were voluntary.

[4] Penry also challenges the exclusion of one venireman for cause. Citing *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), the state argues that Penry procedurally defaulted on the issue. When the state court opinion is silent as to whether it used the procedural bar,

this Court will consider "whether the state court has used procedural default in similar cases to preclude review of the claim's merits, whether the history of the case would suggest that the state court was aware of the procedural default, and whether the state court's opinions suggest reliance upon procedural grounds or a determination of the merits."

Ortega v. McCotter, 808 F.2d 406, 408 (5th Cir.1987) (quoting *Preston v. Maggio*, 705 F.2d 113, 116 (5th Cir.1983)). In the state habeas claim here, the only time that issue was raised, the state court simply denied the writ without an opinion. However, Texas has consistently applied a procedural bar to exclusion of veniremen without objection. *Hawkins v. State*, 660 S.W.2d 65, 82 (Tex.Crim.App.1983). Similarly, the state court was aware of the procedural bar in this case since the state raised the bar in its reply to Penry's state habeas claim. Therefore, under the *Preston* test, the claim is barred if Penry failed to object to the exclusion at trial.

At trial, Penry's counsel originally objected to the state's motion to exclude the venireman for cause. However, after a number of attempts at rehabilitation, counsel withdrew his objection and the challenge for cause was granted. Penry argues that the attorney's argument was not "an expressed withdrawal of the objection but a statement of resignation to the fact that the Court was going to grant the State's challenge for cause in spite of the objection." We disagree. Our reading of that part of the voir dire convinces us that counsel did expressly withdraw his objection. He did so "regretfully" because he wanted the juror but knew that the juror could not be rehabilitated. The *Sykes* bar precludes our consideration of the merits of the issue.

III.

A.

The jury rejected Penry's insanity defense and found him guilty of capital murder.

1. At the time of Penry's offense, section 19.03 of the Texas Penal Code Ann. (Vernon 1974) provided:

(a) A person commits an offense [of capital murder] if he commits murder as defined under Section 19.02(a)(1) of this code and:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson;

(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) the person commits the murder while escaping or attempting to escape from a penal institution; or

der.¹ The Texas bifurcated statutory scheme then provides for the jury to decide the sentence by answering three "Special Issues":

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Tex.Crim.Proc.Code Ann. art. 37.071(b) (Vernon 1981 & Supp.1987). If the jury unanimously answers "yes" to all three questions, the court must sentence the de-

(5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution.

Penry was found guilty of a violation of subsection (a)(2), "in the course of committing and attempting to commit the offense of aggravated rape." *Penry v. State*, 691 S.W.2d at 641.

Subsequent amendments have changed "aggravated rape" to "aggravated sexual assault" and have added:

(6) the person murders more than one person:

(A) during the same criminal transaction; or

(B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct.

Texas Penal Code Ann. § 19.03 (Vernon Supp.1987).

fendant to death. Tex.Crim.Proc.Code Ann. art. 37.071(c)(e) (Vernon 1981 & Supp. 1987). Otherwise, the defendant must be sentenced to life imprisonment. *Id.* Here, additional evidence was introduced in the sentencing phase. The jury was then instructed, *inter alia*:

You are further instructed that in determining each of these Special Issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the answers to Special Issues hereby submitted to you.

The jury instructions then proceeded to list, without definition, the three special issues with names of the defendant and decedent inserted.

Penry objected to the jury charge. He complained that the court failed to define "deliberately," "probability," "criminal acts of violence" and "continuing threat to society." He also objected that the court failed to instruct the jury to weigh aggravating and mitigating circumstances and failed to authorize a discretionary grant of mercy based on the existence of mitigating circumstances.

The objections were overruled and the jury answered "yes" to all three special issues. Penry was sentenced to death. On direct appeal, the Texas Court of Criminal Appeals rejected Penry's objections to the jury charge. *Penry v. State*, 691 S.W.2d at 653-54. The court held that the words used in the special issues need not be defined because the jury could understand the words' common meaning. *Id.* With

respect to Penry's argument on weighing of aggravating/mitigating circumstances, the court stated that

it has in effect been answered by the Supreme Court's opinion in *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), upholding this State's statutory scheme for imposing capital murder. Our statutory scheme allows for broad consideration of aggravating and mitigating factors. V.T.C.A. Penal Code, Sec. 19.03 ensures that imposition of the death sentence is not even a possibility if certain aggravating circumstances are not proven beyond a reasonable doubt by the State.

Defendants are allowed to present all possible relevant mitigating information at the punishment hearing, as part of the effort to aid the jury in answering the special issues.

Defense counsel is allowed to argue against the death penalty in general, or its imposition in the particular case at hand in light of all relevant mitigating factors. In sum, the Texas death penalty scheme passes constitutional muster despite failure to require the jury to find that aggravating factors outweigh mitigating ones.

Id. at 654.

The jury was allowed to hear all evidence that might mitigate the culpability of Penry's deeds or his person. The jury could then consider (i.e. *think about*) the bearing of all of the evidence, aggravating and mitigating, upon the ultimate question of whether Johnny Paul Penry should be put to death. If, however, that consideration should lead the jury to decide against the death sentence, how is the decision given effect and incorporated into the verdict? No interrogatory asks about that most cru-

cial decision. Having said that it was a deliberate murder and that Penry will be a continuing threat, the jury can say no more. The court, following Texas law, ends the matter and orders death. It is difficult to see how this procedure accords with some of the Supreme Court's writings on the Eighth Amendment's mandate of individualized application of all mitigation along with aggravation in the sentencing decision. In order to explain our concern, we must look further at the Supreme Court's writings on capital punishment.

B.

The Supreme Court, in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), laid the foundations for the post-*Furman*² era of capital punishment. The plurality³ in *Gregg* held that the Georgia capital punishment statute was constitutional. 428 U.S. at 207, 96 S.Ct. at 2941. That statute provided for a bifurcated trial with the guilt/innocence phase followed by a punishment stage. *Id.* at 195, 96 S.Ct. at 2935. At the punishment stage, the jury had to find at least one aggravating circumstance before it could impose the death penalty. *Id.* at 197, 96 S.Ct. at 2936. Additionally, at the punishment phase, the jury could consider any other aggravating or any mitigating circumstances before imposing either death or life imprisonment. *Id.*

2. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). *Furman* effectively struck down all capital punishment statutes in place at that time.

3. Only three members of the Court, Justices Stewart, Powell and Stevens, were in the majority in *Gregg* as well as the four other death penalty cases decided that day. *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913

Although the Court warned that "each distinct system must be examined on an individual basis," *id.* at 195, 96 S.Ct. at 2935, two basic principles stand out. First, in order to pass constitutional muster, the sentencer's⁴ discretion must be narrowed. That can be accomplished by the finding of aggravating circumstances either about the crime or the defendant involved. Second, the sentencer must consider the circumstances and the defendant involved. That is usually done through consideration of mitigating circumstances.

The other four cases decided on the same day as *Gregg* all involved application of the two basic principles. In *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), the Court struck down a North Carolina law that mandated the death penalty for "a broad category of homicidal offenses." 428 U.S. at 287, 96 S.Ct. at 2983. The Court found that one of the statute's "constitutional shortcomings" was that it failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." *Id.* at 303, 96 S.Ct. at 2991. Likewise, the Louisiana mandatory death penalty, even though it was considerably narrower than North Carolina's and provided for jury instruction on lesser included offenses even if not warranted by the evidence, was, for similar reasons, found to be unconstitutional.

(1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). Those opinions, as confirmed by subsequent decisions, represent the law involved.

4. The sentencer may be a judge instead of a jury. See discussion concerning *Proffitt*, *infra* slip opinion at pp. 675-676, pp. — — —.

Roberts v. Louisiana, 428 U.S. 325, 332, 335-36, 96 S.Ct. 3001, 3005, 3007, 49 L.Ed.2d 974 (1976).

The Florida statute was considered by the Court in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). That statute, similar to Georgia's, required the sentencer (the judge with an advisory jury) to weigh eight enumerated aggravating circumstances against seven enumerated mitigating circumstances. *Id.* at 251, 96 S.Ct. at 2966. The Court found the statute constitutional since the aggravating factors serve to narrow the focus on the crime and the mitigating factors force the sentencer to "focus on the individual circumstances of each homicide and each defendant." *Id.* at 252, 96 S.Ct. at 2966.

The Court, on the same day as *Gregg*, *Proffitt*, *Roberts*, and *Woodson*, considered the Texas statute at issue here. The Court first held that the Texas definition of capital murder in § 19.03 was the equivalent of finding "a statutory aggravating circumstance before the death penalty may be imposed." *Jurek v. Texas*, 428 U.S. 262, 270, 96 S.Ct. 2950, 2956, 49 L.Ed.2d 929 (1976). The Court then addressed the issue of mitigating circumstances:

But a sentencing system that allowed the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing determination that we today have held in *Woodson v. North Carolina* to be required by the Eighth and Fourteenth Amendments. For such a system would approach the mandatory laws that we today hold unconstitutional in *Woodson* and *Roberts v. Louisiana*. A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.

Thus, in order to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances. In *Gregg v. Georgia*, we today hold constitutionally valid a capital-sentencing system that directs the jury to consider any mitigating factors, and in *Proffitt v. Florida* we likewise hold constitutional a system that directs the judge and advisory jury to consider certain enumerated mitigating circumstances. The Texas statute does not explicitly speak of mitigating circumstances; it directs only that the jury answer three questions. Thus, the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors.

The second Texas statutory question asks the jury to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" if he were not sentenced to death. The Texas Court of Criminal Appeals has yet to define precisely the meanings of such terms as "criminal acts of violence" or "continuing threat to society." In the present case, however, it indicated that it will interpret this second question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show:

In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look

to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand. 522 S.W.2d, at 939-940.

Id. at 271-73, 96 S.Ct. at 2956-57 (citations and footnotes omitted). The Court then concluded:

Thus, Texas law essentially requires that one of five aggravating circumstances be found before a defendant can be found guilty of capital murder, and that in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it. It thus appears that, as in Georgia and Florida, the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death.

Id. at 273-74, 96 S.Ct. at 2957 (footnotes omitted).

We have no doubt that the Texas statute sufficiently narrows the circumstances in which death is imposed. Instead, we are concerned with *Gregg's* second part; the individual consideration of the circumstances of the crime and the character of the individual. That law has not been stagnant since *Gregg*. The Supreme Court has developed what is meant by individualized consideration.

Two years after *Gregg*, the Court considered an Ohio capital punishment statute

that required the death penalty unless one of three narrowly drawn mitigating circumstances was present. *Lockett v. Ohio*, 438 U.S. 586, 593-94, 98 S.Ct. 2954, 2959, 57 L.Ed.2d 973 (1978). The Court found the statute unconstitutional, holding

that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 604, 98 S.Ct. at 2964-65 (emphasis in original).

In *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982), the defendant, 16 years old at the time of the murder, offered evidence of his troubling family background and his emotional disturbance. In sentencing *Eddings* to death, the trial judge stated that "in following the law, he could not 'consider the fact of this young man's violent background.'" *Id.* at 112-13, 102 S.Ct. at 876. The Court found that the sentencing violated the rule in *Lockett*:

Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence *Eddings* proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Id. at 113-15, 102 S.Ct. at 876-77 (footnotes omitted).

After *Eddings*, the Court has made clear that the range of mitigating factors that must be considered is very wide. For example, in *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), the Court reversed a death sentence because the trial court refused to allow evidence of Skipper's good adjustment to prison. Since that relevant mitigating evidence was excluded the Court reversed on *Eddings* grounds. *Skipper*, 476 U.S. at —, 106 S.Ct. at 1673.

The most recent Supreme Court case to look at mitigating evidence was *Hitchcock v. Dugger*, — U.S. —, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). In that case, the defendant Hitchcock introduced evidence of consequences of his childhood habit of inhaling gas fumes, together with other misfortunes of his youth. *Hitchcock*, 107 S.Ct. at 1823-24. The court of appeals affirmed the denial of habeas relief holding that the presentation of the evidence and Hitchcock's attorney's argument to "consider the whole picture, the whole ball of wax," was sufficient to show that he had "an individualized sentencing hearing." *Hitchcock v. Wainwright*, 770 F.2d 1514, 1518 (11th Cir.1985) (en banc), *rev'd sub nom.*, *Hitchcock v. Dugger*, — U.S. —, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). A unanimous Supreme Court reversed. *Hitchcock*, 107 S.Ct. at 1821. Instead of looking to what evidence was presented to the jury and the argument of defense counsel, the Court focused on the jury instructions and the prosecutor's argument. *Id.* at 1823-24. The Florida statute at the time of trial provided for consideration of certain enumerated aggravating circumstances and certain enumerated mitigating circumstances. *Id.* at 1822-23. Although

there was some doubt whether the Florida statute prohibited the use of nonstatutory mitigating circumstances, the court did not address the issue "[b]ecause our examination of the sentencing proceedings actually conducted in this case convinces us that the sentencing judge assumed such a prohibition and instructed the jury accordingly...." *Id.* at 1823. The Court focused on both the prosecutor's argument and the jury instructions. The prosecutor told the jury "to consider the mitigating circumstances and consider those by number," and he went down the list item by item. *Id.* at 1824. The trial judge instructed the jury that "[t]he mitigating circumstances which you may consider shall be the following" and then listed the statutory mitigating circumstances. *Id.* at 1824. The Court concluded: "[w]e think it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of *Skipper v. South Carolina*, *Eddings v. Oklahoma*, and *Lockett v. Ohio*." *Id.* (citations omitted).

[5, 6] It is therefore abundantly clear that a sentencing authority must not be precluded from considering any, or almost any, mitigating evidence. The issue here is what the term "consider" means. The Supreme Court has held that presentation of mitigating circumstances to the sentencing authority is not enough: "[n]ot only did the Eighth Amendment require that capital-sentencing schemes permit the defendant to present any relevant mitigating evidence, but *Lockett* requires the sentencer to listen to that evidence." *Sumner v. Shuman*, — U.S. —, —, 107 S.Ct. 2716,

2722, 97 L.Ed.2d 56 (1987) (quoting *Eddings*, 455 U.S. at 115, n. 10, 102 S.Ct. at 877, n. 10). We read the Court's command that the sentencer not be precluded from "considering" any mitigating circumstance to mean that the sentencer not be precluded from listening to and acting upon any mitigating circumstance. That is not to say that the aggravating and mitigating circumstances must be balanced in any particular way. See *Zant v. Stephens*, 462 U.S. 862, 873-80, 103 S.Ct. 2733, 2741-44, 77 L.Ed.2d 235 (1983). It is simply to say that the jury may not be precluded from allowing the evidence of mitigation to enter into their decision.

The Supreme Court, in effect, has approached capital cases from two different ends. First, "a State must 'narrow the class of murderers subject to capital punishment,' by providing 'specific and detailed guidance' to the sentencer." *McCleskey v. Kemp*, — U.S. —, —, 107 S.Ct. 1756, 1772-73, 95 L.Ed.2d 262 (1987) (citations omitted) (citing *Gregg*, 428 U.S. at 196, 96 S.Ct. at 2936 and *Proffitt*, 428 U.S. at 253, 96 S.Ct. at 2967). On the other side, "the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence." *McCleskey*, 107 S.Ct. at 1773; see also *Shuman*, 107 S.Ct. at 2723 (Eighth Amendment violated by statute that requires the death sentence for defendant who murders while serving a life sentence without the possibility of parole); see generally *California v. Brown*, — U.S. —, —, 107 S.Ct. 837, 841-42, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring) (discussing the "tension" between "the two central principles of our Eighth Amendment jurisprudence").

Turning back to the Texas sentencing procedure, we see that the jury is to respond to three "special issues." The third issue involves provocation by the deceased. Tex.Crim.Proc.Code Ann. art. 37.071(b). It rarely enters into the decision of the jury. Instead, the focus is on the first two questions: whether the killing was deliberate with the reasonable expectation that death would follow and whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Crim.Proc.Code Ann. art. 37.071(b). The Texas Court of Criminal Appeals has consistently held that the words of these special issues have clear meanings that need no definition. *Penry*, 691 S.W.2d at 653-54. The jury is instructed, as here, that in answering "each Special Issue you may take into consideration all of the evidence...." No jury instruction on mitigating evidence is necessary because "[t]he jury can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a probability of future criminal acts of violence." *Cordova v. State*, 733 S.W.2d 175, 190 (Tex.Crim.App. 1987) (quoting *Quinones v. State*, 592 S.W.2d 933, 947 (Tex.Crim.App.), *cert. denied*, 449 U.S. 893, 101 S.Ct. 256, 66 L.Ed.2d 121 (1980)).

The issue, then, is whether the questions, within their common meaning, permit the jury to act on all of the mitigating evidence in any manner they choose. In other words, is the jury precluded from the individual sentencing consideration that the Constitution mandates? The jury may only find whether the murder was deliberate with a reasonable expectation of death and whether there is a probability that the defendant will in the future commit criminal acts of violence that constitute a threat to

society. Although most mitigating evidence might be relevant in answering these questions, some arguably mitigating evidence would not necessarily be. The jury, then, would be effectively precluded from acting on the latter. Actually, these questions are directed at additional aggravating circumstances. Once found beyond a reasonable doubt, the death penalty is then mandatory.⁵ The jury cannot say, based on mitigating circumstances, that a sentence less than death is appropriate. How can a jury act on its "discretion to consider relevant evidence that might cause it to decline to impose the death penalty"? *McCleskey*, 107 S.Ct. at 1773. Where, in the Texas scheme is the "moral inquiry" of the "individualized assessment of the appropriateness of the death penalty"? *Brown*, 107 S.Ct. at 841 (O'Connor, J., concurring).

We recognize that *Jurek* specifically upheld the Texas statute, as the state argues. Developing Supreme Court law, however, recognizes a constitutional right that the jury have some discretion to decline to impose the death penalty. There is a question whether the Texas scheme permits the full range of discretion which the Supreme Court may require.⁶ Perhaps, it is time to reconsider *Jurek* in light of that developing law.⁷

5. Commentators have expressed similar views. See Benson, *Texas Capital Sentencing Procedure After Eddings: Some Questions Regarding Constitutional Validity*, 23 S.Tex.L.J. 315 (1982); Green, *Capital Punishment, Psychiatric Experts, and Predictions of Dangerousness*, 13 Capital U.L.Rev. 533 (1984). Green argues that once the prosecutor's psychiatrist pronounces a defendant a sociopath, as usually happens, the answer to the future dangerousness issue is preordained. *Id.* at 553.

7 The United States Supreme Court has recently granted certiorari in *Franklin v. Lynaugh*, 823 F.2d 98 (5th Cir. 1987), cert. granted, 56 U.S.L.W. 3287 (U.S. Oct. 9, 1987) (No. 87-5546), limited to the question:

Penry's conviction is a good example of mitigating circumstances that pose a problem under the Texas scheme. Penry introduced evidence of his mental retardation and his inability to read or write. He had never finished the first grade. His emotional development was that of a child. He had been beaten as a child, locked in his room without access to a toilet for considerable lengths of time. He had been in and out of a number of state schools. One effect of his retardation was his inability to learn from his mistakes.

The evidence is similar to that in *Hitchcock* and *Eddings*. Those cases arguably teach us that it must be considered by the sentencer. Yet the Penry jury was allowed only to answer two questions. First, was the killing deliberate with reasonable expectation of death. Having just found Penry guilty of an intentional killing, and rejecting his insanity defense, the answer to that issue was likely to be yes. Although some of Penry's mitigating evidence of mental retardation might come into play in considering deliberateness, a major thrust of the evidence on his background and child abuse, logically, does not. The second question then asked whether Penry would be a continuing threat to society. The mitigating evidence shows that Penry could not learn from his mistakes. That suggests an affirmative answer to the second question. What was the jury to do if it decided that

6. Justice White, concurring in part, dissenting in part and concurring in the judgment in *Lockett* states, "[i]t ... seems to me that the plurality strains very hard and unsuccessfully to avoid eviscerating the handiwork in *Proffitt v. Florida* and *Jurek v. Texas*...." *Lockett*, 438 U.S. at 623, 98 S.Ct. at 2983 (citations omitted). It was the same Florida statute that was approved in *Proffitt* that was applied unconstitutionally in *Hitchcock*.

Whether the jury may be instructed on the effect of mitigating evidence under the Texas capital punishment scheme.

Penry, because of retardation, arrested emotional development and a troubled youth, should not be executed? If anything, the evidence made it more likely, not less likely, that the jury would answer the second question yes. It did not allow the jury to consider a major thrust of Penry's evidence as mitigating evidence. We do not see how the evidence of Penry's arrested emotional development and troubled youth could, under the instructions and the special issues, be fully acted upon by the jury. There is no place for the jury to say "no" to the death penalty based on a principal mitigating force of those circumstances.

The state argues that Penry's counsel could, and did, argue the mitigating circumstances to the jury. The defense attorney in *Hitchcock* also argued to the jury to "consider the whole picture, the whole ball of wax." 107 S.Ct. at 1824. The prosecutor in *Hitchcock* then stood up and argued to the jury to consider the mitigating circumstances by number. *Id.* Likewise, here, the prosecutor was able to trump the defense counsel's argument:

I didn't hear Mr. Newman or Mr. Wright [defense attorneys] say anything to you about what your responsibilities are. In answering these questions based on the evidence and following the law, and that's all that I asked you to do, is go out and look at the evidence. The burden of proof is on the State as it has been from the beginning, and we accept that burden. And I honestly believe that we have more than met that burden, and that's the reason you didn't hear Mr. Newman argue. He didn't pick out these issues and point out to you where the State had failed to meet this burden. He

didn't point out the weaknesses in the state's case because, ladies and gentlemen, I submit to you we've met our burden.

As in *Hitchcock*, the mere fact that defense counsel argued mitigating circumstances does not conclude the matter. The question is whether the jury could act on the mitigating circumstances and not impose the death penalty. The prosecutor's argument would exclude that consideration.

C.

Jurek expressly held that the Texas statute is constitutional. After *Jurek*, the Court has reiterated that stance a number of times. For example, in *Lockett* the Court stated that the Texas statute "survived the petitioner's Eighth and Fourteenth Amendment attack because three Justices concluded that the Texas Court of Criminal Appeals had broadly interpreted the second question—despite its facial narrowness—so as to permit the sentencer to consider 'whatever mitigating circumstances' the defendant might be able to show." *Lockett*, 438 U.S. at 607, 98 S.Ct. at 2966. Similar reasoning has been used in a number of other cases. See, e.g., *Zant*, 462 U.S. at 875 n. 13, 103 S.Ct. at 2742 n. 13; *Lockhart v. McCree*, 476 U.S. 162, —, 106 S.Ct. 1758, 1769-70, 90 L.Ed.2d 137 (1986). We think that a strong argument can be made that developing law, see, e.g., *Hitchcock*, is inconsistent. However, even if we were free to decide that inconsistency and reach a different result, see *Brock v. McCotter*, 781 F.2d 1152, 1157 n. 5 (5th Cir.), cert. denied, — U.S. —, 106 S.Ct. 2259, 90 L.Ed.2d 704 (1986), we are not free to do so because prior Fifth Circuit deci-

Penry, apparently, was approximately 22 years old at the time of the crime.

ist be instructed on the effect of mitigating evidence under the Texas capital punishment scheme.

sions have rejected claims similar to Penry's. *Riles v. McCotter*, 799 F.2d 947, 952-53 (5th Cir.1986); *Granviel v. Estelle*, 655 F.2d 673, 675-77 (5th Cir.1981), *cert. denied*, 455 U.S. 1003, 102 S.Ct. 1636, 71 L.Ed.2d 870 (1982). These prior panel holdings bar a different holding by us.

IV.

The stay of execution is vacated. The judgment denying the writ is AFFIRMED.

GARWOOD, Circuit Judge, concurring:

I join Judge Reavley's thoughtful opinion, and append these remarks merely to further explore, from what may be my slightly different perspective, some of the possible ramifications of *Jurek* and its relationship to other Supreme Court decisions of the kind called attention to by Judge Reavley.

Undoubtedly, as Judge Reavley so cogently explains, there is a tension between the two major themes of the Supreme Court's recent capital sentencing jurisprudence, and it is certainly not inconceivable that the ultimate resolution of that tension may undermine *Jurek*. However, I do not understand us to suggest, and I do not believe, that such a result is either inevitable or desirable.

That the Court knew what it was doing in *Jurek* must be assumed not only out of proper respect for the Court, but also because of the concurring opinion therein of Justice White (joined by the Chief Justice and Justice Rehnquist), as well as Justice White's dissent (joined by the Chief Justice and Justices Blackmun and Rehnquist) in *Roberts* (Stanislaus) v. *Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976), and Justice Rehnquist's dissent in

Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), each decided the same day as *Jurek*. Justice White's *Jurek* concurrence observed that the Texas "statute does not extend to juries discretionary power to dispense mercy." 96 S.Ct. at 2959. His dissent in *Roberts* points out that under the Texas statute upheld in *Jurek*, "capital punishment is required if the defendant is found guilty of the crime charged and the jury answers two additional questions in the affirmative. Once that occurs, no discretion is left to the jury; death is mandatory." 96 S.Ct. at 3018. And, in *Woodson*, Justice Rehnquist's dissent points out that under the Texas system upheld in *Jurek*, "[t]he jury is required to answer three statutory questions. If the questions are unanimously answered in the affirmative, the death penalty must be imposed." 96 S.Ct. at 2996 (emphasis in original). It is true, of course, that Justice Stewart's plurality opinion in *Jurek* relied heavily on the breadth of circumstances which the Texas Court of Criminal Appeals in *Jurek* itself (as well as in another case) had indicated could properly be considered in answering the sentencing special interrogatories, particularly the second. 96 S.Ct. 2950 at 2956-57. However, it is to be noted in this connection that the Texas courts, both generally and in Penry's case, have kept the promise of *Jurek*, and have not to any extent narrowed the circumstances appropriate for consideration under the sentencing special issues as indicated in *Jurek*.

Moreover, since *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)—the decision most in tension with *Jurek*—the Supreme Court has cited *Jurek* favorably in numerous cases. See *Sumner v. Shuman*, — U.S. —, 107 S.Ct. 2716, 2721, 97 L.Ed.2d 56 (1987); *Lockhart v.*

McCree, 476 U.S. 162, 106 S.Ct. 1758, 1770, 90 L.Ed.2d 137 (1986); *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 1671, 90 L.Ed.2d 1 (1986); *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 876, 879, 79 L.Ed.2d 29 (1984) (declining to "effectively overrule *Jurek*"); *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 3453-54, 77 L.Ed.2d 1171 (1983); *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 3396, 77 L.Ed.2d 1090 (1983); *Zant v. Stephens*, 462 U.S. 862, 100 S.Ct. 2733, 2742 n. 13, 77 L.Ed.2d 235 (1983). See also *Tison v. Arizona*, — U.S. —, 107 S.Ct. 1676, 1687, 95 L.Ed.2d 127 (1987) (citing *Selva v. State*, 680 S.W.2d 17, 22 (Tex.Crim.App.1984)). As reflected below, *Jurek* was likewise frequently cited with approval prior to *Eddings*. See also, e.g., *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 2524 n. 1, 65 L.Ed.2d 581 (1980).

The scope of those more recent Supreme Court decisions which are in tension with *Jurek* is not entirely clear respecting what considerations the sentencer must be allowed to take into account in determining the appropriateness of a death sentence. In Penry's case, not only was the jury plainly allowed to hear and instructed to consider *all* evidence proffered, but also the special issues submitted adequately allowed the jurors to give effect to this evidence insofar as they might deem it relevant either to the moral culpability of Penry's own conduct and state of mind on the particular occasion in question or to his possible rehabilitation or future dangerousness to society. What the special issues did not afford the jury a vehicle for giving effect to was Penry's implicit plea that, although his own individual actions and state of mind on the occasion in question were morally culpable and although his character generally was such that he was

not a good prospect for rehabilitation and would pose a continuing danger to society, nevertheless he was not to blame either for his own thus unsatisfactory character, or for his own immoral conduct and state of mind on the occasion in question, because these were products of his tragically disadvantaged youth. It is not entirely clear that the Supreme Court's decisions respecting individualized consideration of the offense and offender have gone so far as to require that effective consideration always be given by the sentencer to such a plea.

The initial individualized consideration cases, *Woodson* and *Roberts* (Stanislaus), were decided the same day as *Jurek*. They each involved mandatory capital sentences for certain general categories of homicide. In *Roberts*, the Court decried the Louisiana statute's "lack of focus on the circumstances of the particular offense and the character and propensities of the offender." 96 S.Ct. at 3006. In *Woodson*, the Court noted that the North Carolina statute, which embraced the felony murder doctrine, "accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense." 96 S.Ct. at 2991 (emphasis added). Neither criticism is substantially applicable to *Jurek*. In *Roberts* (Harry) v. *Louisiana*, 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977), decided the following year, another mandatory capital sentencing scheme was struck down. The Court observed: "Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a peace officer" but

which the Louisiana statute did not take into account. *Id.* at 1995 (emphasis added). Again, *Jurek* is not subject to this criticism. These statutes all had in common the prohibition of any considerations other than guilt of the particular offense.

The Court first went beyond that category of case the next year in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), which involved a death sentence imposed on a twenty-one-year-old woman who was an accomplice to the murder but did not actually kill the victim. There was evidence that "her prognosis for rehabilitation" . . . was favorable," and she had no major offenses on her record. *Id.* at 2959. The sentencing statute was held invalid because it "did not permit the sentencing judge to consider, as mitigating factors, her character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime." *Id.* at 2961. Particular reliance was placed on *Woodson*, and *Jurek* was cited with apparent approval. *Id.* at 2963. Justice Blackmun limited his concurrence to cases where the death sentence was imposed on "a defendant who only aided and abetted a murder, without permitting any consideration by the sentencing authority of the extent of her involvement, or the degree of her *mens rea*, in the commission of the homicide." *Id.* at 2969. Justice Marshall, in his concurrence, pointed out that the defendant "was sentenced to death for a killing that she did not actually commit or intend to commit" and that the Ohio statute "precluded any effective consideration of her degree of involvement in the crime, her age, or her prospects of rehabilitation." *Id.* at 2972.

It is apparent that none of the considerations which *Lockett* held must be taken into account in determining whether a sen-

tence of death should be imposed, were precluded from being given effective consideration by the jury in Penry's case. Each of these considerations is relevant to either the first or second sentencing inquiry under the Texas scheme as announced in *Jurek* and applied in this case.

It is also to be noted that Justice White concurred in the result in *Lockett* on substantive grounds, namely, that the Eighth Amendment prohibited capital punishment for one who did not intend the death of the victim. *Id.* at 2983. This view was largely vindicated in *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), where the Court held that the death sentence could not constitutionally be imposed on one who did not kill or attempt to kill or have any intention of participating in or facilitating a killing. *Id.* at 3377. *Enmund* placed principal reliance on *Lockett* and *Woodson*. *Id.* The *Enmund* Court noted that "Enmund's own conduct" must be the basis for punishment and "[t]he focus must be on his culpability." *Id.* (emphasis in original). Consideration of the deterrence justification for punishment made defendant's state of mind particularly relevant. *Id.* The Court observed that "[a]s for retribution as a justification for executing Enmund, we think this very much depends on the degree of Enmund's culpability—what Enmund's intentions, expectations, and actions were," and that "Enmund's criminal culpability must be limited to participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt." *Id.* at 3378. In these passages, the Court is obviously measuring personal responsibility and moral guilt by the circumstances of the particular offense and the defendant's participation and state of mind with reference to it. These considerations appear to

be adequately taken into account in the Texas sentencing scheme. The *Enmund* analysis was reconfirmed in *Tison*, 107 S.Ct. at 1683, 1687.

Likewise, in other cases where the Supreme Court has struck down a capital sentencing scheme because of its mandatory nature or its preclusion of consideration of mitigating factors, a significant and perhaps crucial aspect of the decision has been that matters relating to the accused's own participation in the crime, or his own state of mind in respect to it, or his potential for rehabilitation or lack of future dangerousness, have been deemed legally irrelevant. Thus, in *Skipper*, the Court held that it was constitutional error to exclude evidence relevant to the accused's "probable future conduct if sentenced to life in prison," and that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating." 106 S.Ct. at 1671. This was stated to be merely the converse of *Jurek*. *Id.* See also *Wainwright v. Goode*, 464 U.S. 78, 104 S.Ct. 378, 382-83, 78 L.Ed.2d 187 (1983) (relevance of future dangerousness). In *Hitchcock v. Dugger*, — U.S. —, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), a death sentence was set aside because the trial court deemed that it was legally barred from taking any account of certain considerations which the defendant offered in mitigation including, as the court twice mentioned, "his potential for rehabilitation" or "his capacity for rehabilitation." *Id.* at 1824. The Court noted that "the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid," and further observed, quoting *Skipper*, that a capital defendant must be "permitted to present any and all relevant mitigating evidence that is available." *Id.* (emphasis added). Most recently, in *Sum-*

ner, the Court struck down Nevada's mandatory death sentence for those committing first degree murder while under a sentence to life imprisonment without possibility of parole. The Court noted that its prior decisions, including *Enmund* and *Tison*, established that "the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual's participation in the crime," and that this consideration was not adequately reflected in the Nevada statute. 107 S.Ct. at 1724. *Sumner* also noted as a possible mitigating factor excluded by the Nevada law "even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct." 107 S.Ct. at 2725 (quoting *Roberts* (Harry)) (emphasis added). The *Sumner* Court went on to observe that in the case before it a possible mitigating factor which the Nevada law ignored was the defendant's "behavior during his 15 years of incarceration, including whether the inmate murder was an isolated incident of violent behavior or merely the most recent in a long line of such incidents." *Id.* at 2726. These factors are clearly consistent with *Jurek*, which, as previously noted, *Sumner* cites with approval.

Of all the cases in this area, *Eddings* is most in tension with *Jurek*. *Eddings* is certainly susceptible of the reading that considerations respecting a defendant's disadvantaged background, of the sort that Penry sought to have the jury give effect to at his sentencing hearing, may not be deemed legally irrelevant. *Eddings* observed that the sixteen-year-old defendant "had been deprived of the care, concern and parental attention that children deserve," and that "the background and mental and emotional development of a youthful defendant [must] be duly considered in

sentencing." 102 S.Ct. at 877. However, it is not entirely clear that as broad a reading as this language considered in isolation suggests must be given to *Eddings*. There the sentencing authority would, as a matter of law, consider as a mitigating factor *nothing* except *Eddings*' chronological youth. *Id.* at 873-74. The Court's opinion further points out that there was testimony from a sociologist "that *Eddings* was treatable," and from a psychiatrist "that, if treated, *Eddings* would no longer pose a threat to society." *Id.* at 873. It likewise noted a psychologist's testimony that *Eddings* had a sociopathic or antisocial personality, but that "approximately 30% of youths suffering from such a disorder grew out of it as they aged." *Id.* Apparently the Oklahoma sentencing authorities also deemed all this evidence legally irrelevant. Certainly the potential for rehabilitation, and the fact that a person can be treated so that he will not be a danger to society, or is youthful so may grow out of his difficulties, may be effectively considered under the Texas scheme. That the Court mentioned this evidence in some detail in *Eddings* suggests that it thought it significant. Justice Powell wrote the majority opinion in *Eddings* and Chief Justice Burger and Justices White, Blackmun, and Rehnquist dissented. In *Skipper*, on the other hand, Justice White, who had dissented in *Eddings*, wrote the majority opinion and Justice Powell, with whom the Chief Justice and Justice Rehnquist joined, dissented on the point relevant here (although they concurred in the result on other grounds). This would appear to indicate that the Court has not fully crystallized its view on this subject.

The foregoing review of the Court's leading opinions in the area suggests that not every aspect of whatever is offered by the

defense as being in mitigation must constitutionally be given effective consideration by the sentencer. As observed, the Court has referred to "relevant" mitigating evidence, "reasonably" believed moral justification, and the "relevant" facets of the character and record of the defendant. In *California v. Brown*, — U.S. —, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987), the Court refused to reverse on account of an instruction that the jury could not be swayed by "sympathy" or "mere sympathy." The *Brown* Court did not regard such an instruction as inconsistent with the rule that "the capital defendant generally must be allowed to introduce any *relevant* mitigating evidence regarding his 'character or record and any of the circumstances of the offense.'" *Id.* at 839 (quoting *Eddings* quoting *Lockett*; emphasis added).

Note must also be taken of the other principal recent theme in the Supreme Court's capital punishment jurisprudence, namely, that "sentencers may not be given unbridled discretion in determining the fate of those charged with capital offenses." *Brown*, 107 S.Ct. at 839. This, of course, stems from the concurring opinions of Justices Douglas, Stewart, and White in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 2727, 2760, 2763, 33 L.Ed.2d 346 (1972). In *Godfrey v. Georgia*, 446 U.S. 4201, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the Court struck down a threshold aggravating circumstance as being overly vague. The plurality noted that this violated its warning in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 2935, 49 L.Ed.2d 859 (1976), that such vague standards would "fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." *Godfrey*, 100 S.Ct. at

1765 (quoting *Gregg*; emphasis added) (*Jurek* is also cited approvingly, 100 S.Ct. at 1764). In *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), where the Court held that jury sentencing was not required for capital cases, it explicated this theme as follows:

"If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Id.* at 3162.

The Court further observed that "the discretion of the sentencing authority, whether judge or jury, must be limited and reviewable." *Id.* at 3163. Moreover, "[t]here must be a valid penological reason for choosing from among the many criminal defendants the few who are sentenced to death." *Id.* at 3162 n. 7.

However, in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the crucial plurality opinion by Justice Stewart, joined by Justices Powell and Stevens, had observed that "the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice." *Id.* at 2939 (emphasis added). In this connection, in *Zant* the Court noted that it did not require jury instructions providing "specific standards to guide the jury's consideration of aggravating and mitigating circumstances." 103 S.Ct. at 2742. And, as the concurring opinion of Justice Stevens, joined by Justice Powell, in *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 3431 n. 2, 77 L.Ed.2d 1134 (1983), rec-

ognized, neither *Lockett* nor *Eddings* established that any particular weight need be given by the sentencer to the mitigating circumstances which those cases held could not be excluded as a matter of law from any consideration.

It would appear, especially given this lack of requirement for instructional guidance or for any particular weight to be given allegedly mitigating circumstances, that the broader the range of such mitigating circumstances and the more attenuated their relationship to valid penological considerations, the more hindered is the system in the performance of its function of rationally distinguishing between those defendants for whom death is appropriate and those for whom it is not. Similarly, in such circumstances the discretion of the sentencing authority becomes more unlimited and unreviewable. It is difficult to understand how a system which requires that the sentencer be given unlimited discretion to assign whatever weight it desires to whatever it might consider to be mitigating can be fairly described as tending "to ensure that the death penalty will be imposed in a consistent, rational manner," *id.* at 3430 (concurring opinion of Stevens, J.), or to minimize "sentencing decision patterns ... [that are] arbitrary and capricious." *Godfrey*, 100 S.Ct. at 1785 (quoting *Gregg*; emphasis added).

The foregoing suggests that the more closely and objectively related an alleged mitigating circumstance is to a valid penological consideration, the stronger the argument for requiring that the sentencer be allowed to take that circumstance into account. The kind of factor which Penry asserts that the jury was not afforded an appropriate vehicle to give effect to is arguably quite remote from the recognized

purposes of punishment and justifications for the death sentence. While the retributive justification for the death penalty depends to some extent on the degree of the defendant's culpability, as well as on the nature and results of the offense, the Supreme Court's decisions indicate that culpability in this connection refers to the defendant's culpability as directly related to his participation in and state of mind respecting the particular offense in question. See *Enmund*, 102 S.Ct. at 3378; *Tison*, — U.S. —, 107 S.Ct. 1670, 1683, 1687, 95 L.Ed.2d 127. See also *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 3011, 77 L.Ed.2d 637 (1983). Such a determination, as well as that respecting rehabilitation potential, can be made with relative objectivity based on the evidence in a particular case. When the sentencer must go beyond that, as Pen-

* In *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971), the Court held it was not unconstitutional to grant the jury "absolute discretion" to impose or not to impose the death sentence on one committing murder in the first degree. *Id.* at 1456. Interestingly, in the companion case of *Crampton v. Ohio*, the Court noted, but suggested no error in, the instruction to the jury that it "must not be influenced by any consideration of sympathy." *Id.* at 1461. By the next year, during which Justices Harlan and Black departed the Court, *McGautha's* "absolute discretion" holding was substantially rendered a dead letter by *Furman*, as was confirmed four years later in *Gregg*, 96 S.Ct. at 2936 n. 47. This may reflect the rapidity, or perhaps the ambiguity, of "the evolving" of "standards of decency" referenced in Chief Justice Warren's opinion in *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958), which had likewise proclaimed the constitutionality of capital punishment. *Id.* at 597-98. Now, a few years still later, has *McGautha* returned, though in the altered form of a mandatory requirement? To some extent, the answer, in light of the Court's post-*Gregg* opinions, must be "yes," but just to what extent is not fully clear.

ry would have it do, and must determine not only the accused's rehabilitation potential and his culpability on the occasion in question but also whether, in essence, he was at fault for being at fault, the decision-making process becomes vastly more subjective and necessarily involves speculation about wholly immeasurable abstractions such as free will and personal responsibility, as to which there is little of either common understanding or common agreement. As such, capital sentencing would also inevitably become far more unpredictable and unreviewable. Would it then, perhaps a few years later, again be subject to challenge on that ground? *

It is also questionable whether unlimited consideration of assertedly mitigating factors can be appropriately defended as a one-way street leading away from capital

Answering the latter question is particularly difficult in light of the fact that the Eighth Amendment's proscription of "cruel and unusual punishments" appears, from its text, context, and history, to be substantive, at least apart from whatever procedural connotations "unusual" may have. The latter may be consistent with the procedural approach of *Gregg* and of Justices Douglas, Stewart, and White in *Furman*. But the then unprecedented procedural reading of the Eighth Amendment given by *Lockett* thrusts entirely in the opposite direction. That the Court has since embraced such a *Lockett*-type procedural requirement as a component of its current Eighth Amendment jurisprudence cannot be doubted. Nor can it be doubted, however, that such a component is not only opposite from that of *Gregg* and the *Furman* three, but is also distinct from the traditional procedural due process approach exemplified, among the post-*Gregg* capital punishment cases, by decisions such as *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Thus, though we know that the *Lockett*-type procedural component exists, there are fewer of the normal guideposts by which to make a principled gauging of its limits and contours.

punishment. Such an argument is not responsive to the asserted desirability of minimizing arbitrariness and indiscriminacy. Moreover, it is doubtful that the street will really be one-way. The Court has held that a state may prove the nonexistence of potential mitigating circumstances, see *Barclay*, 103 S.Ct. 3418 at 3428, and where the range of potentially mitigating factors is almost unlimited what one sentencer may regard as mitigating another may view as aggravating.

Finally, even if, as now appears to be the case, the principles of the *Furman* plurality do not require a state to put any limits on the factors which the sentencer may determine to be mitigating, nevertheless this does not mean that a state has no voice in choosing the "substantive factors relevant to the penalty determination." *Ramos*, 103 S.Ct. at 3453. See also *id.* at 3452. While it is plain that whatever discretion a state may have in this respect does not extend to excluding from all con-

sideration the defendant's potential for rehabilitation, his lack of dangerousness, or the nature of his participation in or state of mind respecting the crime charged, nevertheless, it may be that a state has room to place some other limits on the sentencer's discretion, at least if those limits subserve valid penological purposes. Surely *Furman* teaches us that a valid penological purpose is fostering predictability, consistency, objectivity, rationality, and reviewability in capital sentencing. That purpose would seem to be fostered by not affording the jurors a vehicle by which to give decisive effect to the sort of considerations advanced by Penry, insofar only as the jurors may deem those considerations wholly irrelevant to either of the two Texas capital sentencing special issues.

Accordingly, while there is indeed a tension between *Jurek* and expressions in other recent decisions of the Court, it is by no means clear that *Jurek* has been or should be fatally undermined.

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION
MURRAY L. HARRIS, CLERK
By *[Signature]*
Deputy

JOHNNY PAUL PENRY
VS.
O. LANE MCCOTTER

NO. L-86-89-CA

ORDER DENYING FIRST AMENDED PETITION
FOR WRIT OF HABEAS CORPUS AND
DISSOLVING STAY OF EXECUTION

Petitioner was sentenced to death following his conviction for the offense of capital murder. The gruesome facts of his crime and the manner of his conviction were sufficiently discussed by the Court of Criminal Appeals of Texas upon their affirmance of the judgment. See Penry v. State, 691 S.W.2d 636 (Tex. Crim. App. 1985), cert. denied, 106 S.Ct. 834 (1986). Petitioner was scheduled to be executed before sunrise on May 7, 1986.

He began this first pursuit of a writ of habeas corpus on April 10, 1986. The state trial court denied his application on April 27, and the Court of Criminal Appeals did likewise on the afternoon of May 5. Petitioner then filed the present application pursuant to 28 U.S.C. § 2254. On May 6, this Court stayed the execution in order to allow adequate time for the presentation and consideration of petitioner's constitutional claims.

APPENDIX B

ORDER DENYING FIRST AMENDED PETITION
FOR WRIT OF HABEAS CORPUS

In his amended petition, filed on May 22, petitioner raised fifteen grounds for relief. For present purposes, these fifteen grounds will be grouped into six broad categories related to the chronological stages of petitioner's trial. He asserts four potential errors which he alleges denied him a full and fair suppression hearing; five grounds of error which he contends demonstrate that his two confessions should have been excluded; one ground concerning the allegedly improper granting of seven of the state's challenges for cause during jury selection; two potential errors made during the trial; two objections made to the charge given at the punishment phase; and one final argument that his sentence constitutes cruel and unusual punishment because of his limited mental capacity. Each allegation will be discussed in the framework of the broader categories.

In reaching its decisions on these matters, the Court had before it the entire transcript of petitioner's trial, including copies of exhibits, as well as appellate briefs and the opinion affirming the conviction on direct appeal, and copies of the materials submitted to the state courts seeking habeas relief which were denied before resort to this Court. The Court reviewed all relevant portions of these materials. See Dillard v. Blackburn, 780 F.2d 509, 513 (5th Cir. 1986) (nothing requires a federal court to review a record in its entirety). The State does not contest the fact that petitioner has exhausted his state court remedies on the claims now before this Court. The parties have agreed and the Court concurs that the

present record covers all factual issues which may be raised in these proceedings, making it unnecessary to hold an evidentiary hearing. Townsend v. Sain, 372 U.S. 293, 313; see also Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts.

After careful consideration of the relevant portions of the record and of the briefs and argument of counsel, the Court has determined that petitioner has failed to state any constitutional ground meriting relief. The Petition for a Writ of Habeas Corpus will be DENIED and the Stay of Execution DISSOLVED for the reasons which follow.

I. CRUEL AND UNUSUAL PUNISHMENT

Although last in a chronological sequence, petitioner's argument that his sentence constitutes cruel and unusual punishment deserves primary attention. It is grounded on the premise that a person who ostensibly thinks like a child should be treated like a child, and Texas does not execute children. Tex. Penal Code Ann. §8.07(d) (Vernon Supp. 1986) ("No person may, in any case, be punished by death for an offense committed while he was younger than 17 years.") In short, petitioner is asking for special consideration due to his limited mental capacity, and this request for special consideration permeates the remainder of his grounds for relief.

In challenging the constitutionality of a death sentence imposed upon a person of his mental ability, petitioner focuses on evidence bearing on his limited capacity. This evidence

indicates his I.Q. falls somewhere between 50 and 63, meaning he has the mind of a six or seven-year-old child and the social maturity of an eight to ten-year-old child. As a telling example of his mental deficiency petitioner refers to the fact that working daily with his aunt, it still required a year to teach him how to write his name.

Other examples abound. There can be no question that petitioner does not think like a "normal" person, but then no normal person would have committed a crime like the one of which Penry was convicted. The blame for Penry's condition probably lies at several doorsteps. There was evidence suggesting he was frequently and severely beaten by his mother, spent much of his childhood in state schools, and in his teens was victimized by other men who treated him like a slave. The ultimate doorstep must be Penry's, however, because he is the one who stands convicted of taking Pamela Carpenter's life.

Although Penry may be mentally abnormal, his upbringing was also abnormal. He has treated others as others have treated him. It may never be clear what role societal factors played in causing Penry's condition. The fact remains that he was convicted of a heinous crime and sentenced to death. The question now is whether society will accord any additional consideration to his condition when determining the punishment it metes out.

The answer is apparently a three-fold no. First, the Texas statute designed to prohibit execution of children has no

apparent application to adults with limited mental capacities. Second, while the Constitution requires that mental deficiencies be considered before imposing a sentence of death, it does not proscribe such a sentence for the mentally deficient. Third, the prohibition against execution of those unable to understand the reason for their punishment apparently does not apply to a person like Penry who has been adjudicated a competent man.

The Texas statute prohibiting execution of defendants who were younger than seventeen when they committed the offense speaks only of calendar age, not mental age. No Texas case has given the statute this broader meaning. See, e.g. Beck v. State, 648 S.W.2d 7, 9 (Tex. Cr. App. 1983); Cammon v. State, 672 S.W.2d 845, 851 (Tex. App. - Corpus Christi 1984, no pet.) (if under 17, life imprisonment is maximum penalty). Giving the statute this interpretation would open the floodgates in Texas courts to claims of "mental" age below seventeen in capital cases. Except for the minimal persuasive value of a Texas policy against executing children, this statute is of no help to petitioner.

Petitioner instead must rely on eighth amendment contentions of cruel and unusual punishment. To date the Supreme Court has not held that the execution of mentally retarded defendants constitutes cruel and unusual punishment, however. Instead, the Court has merely required that juries consider why the death penalty should not be imposed as well as why it should be imposed (mitigating as well as aggravating

factors). Jurek v. Texas, 428 U.S. 262, 271 (1976). Mental retardation is nothing more than one of the mitigating factors to be considered.

In Jurek, the Supreme Court upheld the facial validity of Texas' death penalty statute, finding that Texas apparently provided sufficient opportunities for the presentation and consideration of mitigating factors. Id. at 272; Brock v. McCotter, 781 F.2d 1152, 1157 n. 5 (5th Cir. 1986), cert. denied, 106 S.Ct. 2259 (1986) (Texas statute withstood challenge to its facial validity in Jurek and remains valid unless inconsistent with new Supreme Court case law). In this case, petitioner's mental capacity was considered by a jury in a competency hearing, at the guilt-innocence phase of the trial, and at the punishment phase of the trial. The jury was able to consider it as a possible mitigating factor at the punishment phase, thus satisfying constitutional requirements.

Finally, petitioner attempts to draw the Supreme Court's most recent pronouncement on insanity and punishment into this case. See Ford v. Wainwright, 106 S.Ct. 2595 (1986). Ford reaffirms prior law prohibiting the execution of the insane. Id. at 2602. In reciting the long history of this prohibition, the Court repeats a quotation from Blackstone indicating that lunatics and idiots should not be punished for their own acts if they were not truly aware of what they were doing. Id. at 2600.

Petitioner, however, does not qualify as an idiot in either the psychiatric or legal sense of that word. He was adjudicated

competent by a jury which heard substantial evidence concerning petitioner's mental capacity. Given the plethora of testimony on both sides of the issues, this Court cannot say that the finding of competency was not fairly supported by the record. See 28 U.S.C. § 2254(d)(8). As such, the finding of competency must be presumed correct. Maggio v. Fulford, 462 U.S. 111, 117 (1983); 28 U.S.C. § 2254(d).

This presumption has far-reaching implications in the present case. Most, if not all, of petitioner's grounds for relief are premised in part on his alleged incompetency or retardation. Petitioner contends, for example, that he could not have voluntarily waived his right to remain silent before he confessed, since his retardation made it impossible for him to say "no" to any authority figure. Petitioner may indeed be retarded, but his impairment is not so severe that he could not have knowingly and voluntarily waived his rights. He is legally competent.

Petitioner's request for habeas relief based on the allegedly cruel and unusual nature of his punishment is therefore DENIED.

II. THE SUPPRESSION HEARING

On February 29, 1980, the 258th District Court of Trinity County, Texas, heard petitioner's pre-trial motions to suppress evidence. Jackson v. Denno, 378 U.S. 368 (1984); R. Vol. 4 at 136-271. The hearing primarily centered on the suppression of State's Exhibits 4 and 6; two statements that petitioner gave to

investigating officers in which he confessed to the rape and murder of Pamela Carpenter. At the suppression hearing, State's witnesses included the two officers who initially questioned petitioner, Chief of Police Smith who took petitioner's first written statement, Texas Ranger Cook who took petitioner's second written statement, the four individuals who witnessed the petitioner's signature, and the justice of the peace before whom petitioner initially appeared.

Petitioner did not testify and offered as his only witness Police Officer Page, the first law enforcement officer to arrive at the scene of the crime. The judge heard argument from counsel for both sides.

The objections voiced by petitioner regarding the two statements embraced two different substantive protections. First, petitioner contended that the confessions were not voluntarily given to officers and, therefore, should be suppressed because their admission would violate his right to be free from compelled self-incrimination. U. S. Const. amend. V and XIV; Miranda v. Arizona, 384 U.S. 436 (1966). Second, petitioner argued that all statements were made following an illegal arrest and, therefore, should be excluded under the "fruit of the poisonous tree" doctrine. U. S. Const. amend. IV; Wong Sun v. United States, 371 U.S. 471 (1963).

The trial court denied the motions to suppress the two statements. Tr. 94-95; R. Vol. 4 at 270. Regarding voluntariness, the trial judge found that petitioner "was not

induced or caused by any person to give or make such written statement[s] by threats, persuasion, compulsion, intimidations, violence, promises, unlawful detention or anything else other than the free and voluntary act" of the petitioner, and therefore his conclusion that no constitutional rights were violated.

The trial judge also found that petitioner was taken before Justice of the Peace Galloway in Livingston, Texas, who warned petitioner that he was charged with capital murder and of the rights incorporated into Art. 15.17 of the Texas Code of Criminal Procedure on October 25, 1979, the day of his arrest. Further, he found that petitioner was warned by the officer to whom each statement was made of all the rights set forth in Art. 38.22 of the Texas Code of Criminal Procedure. The trial judge found that petitioner knowingly and voluntarily waived these rights.

The trial judge impliedly found that the petitioner was not under arrest when his first oral confession was made. R. Vol. 4 at 270. Petitioner was clearly under arrest when the two written statements were taken. R. Vol. 4 at 199.

Under 29 U.S.C. § 2254(d) a state court factual finding is entitled to a "presumption of correctness" in a federal habeas corpus proceeding unless one of eight enumerated exceptions apply. Miller v. Fenton, 106 S.Ct. 445 (1985); 28 U.S.C. § 2254(d). The voluntariness of a confession is not a factual issue entitled to the § 2254(d) presumption of correctness, but

is a purely legal question subject to independent federal review. Id. at 451. In other words, the ultimate legal conclusion of whether under the totality of the circumstances petitioner's statement was the product of his free will or the product of circumstances overbearing his free will is not presumed to be correct, regardless of the § 2254(d) exceptions. When voluntariness is challenged on habeas corpus review it is subject to plenary federal determination. Id.; see also Brantley v. McKaskle, 722 F.2d 187 (5th Cir. 1983). However, this Court believes that there is fair support in the record for the underlying factual findings and is bound by the presumption of correctness of those findings made by the trial court, concerning the absence of threats, persuasion, compulsion, intimidation, violence, promises and unlawful detention. Miller, 106 S.Ct. at 453; 28 U.S.C. § 2254(d)(8).

Although the first four points in petitioner's application challenge aspects of the Jackson v. Denno hearing, it is clear to the Court that they do not directly challenge the legal conclusion that his confessions were not voluntary. Rather, they focus on alleged flaws in the state court proceeding which allegedly denied him a full and fair suppression hearing. In other words, petitioner has focused on the "historical" facts which support the legal conclusion that his confessions were given voluntarily. These historical facts are entitled to a presumption of correctness unless petitioner can persuade the

Court that one or more of his first four grounds, if true, did deny him a full and fair hearing.

It is at this point that some confusion exists. On the one hand, petitioner has stipulated that the record now before the Court is factually complete, and he agrees with the State that no evidentiary hearing is necessary. On the other hand, the grounds raised in his first four points would make another evidentiary hearing necessary in the state court, since such a hearing is the remedy available to petitioner if this Court finds his state hearing was not full or fair. Sigler v. Parker, 396 U.S. 482 (1970). Prevailing on one of these four points would destroy any presumption of correctness accorded to the historical facts, and would require an evidentiary hearing, but would not alone warrant vacating the state court judgment. It is with this understanding that the Court considered the initial four grounds of petitioner's application.

In these first four grounds for habeas corpus relief petitioner asserts that he was denied a full and fair suppression hearing because of: (1) the failure of the State to produce all statements made by petitioner to peace officers pursuant to the trial court's discovery order; (2) the failure of Billy Ray Nelson to testify truthfully at the suppression hearing; (3) the failure of the prosecutor to inform petitioner that he was the focus of the criminal investigation; and (4) the failure of the trial court to approve additional funds for an investigator to interview witnesses on petitioner's behalf.

a. Background

It is clear that petitioner has the constitutional right to have "a fair hearing and a reliable determination of the issue of voluntariness." Jackson v. Denno, 378 U.S. 368, 377 (1964), and that the guarantees of due process call for a "hearing appropriate to the nature of the case." United States v. Raddatz, 447 U.S. 667, 677 (1980) quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 327 (1937). In the sense of a federal habeas corpus proceeding alleging constitutional error in a state court suppression hearing, the federal district court should determine upon independent review that material facts were adequately developed and that petitioner had a "full, fair, and adequate opportunity to present all relevant facts at the suppression hearing." See e.g. Nix v. Williams, 104 S.Ct. 2501, 2512 (1984). It is through these flexible standards of due process that this Court must sift petitioner's claims of a denial of a full and fair suppression hearing. After a full review of the suppression hearing transcript, briefs, and applicable law the Court finds that petitioner's claims are without merit.

b. Confessions of Petitioner

Petitioner claims that he was denied his due process right to a full and fair suppression hearing because the prosecutor failed to disclose, pursuant to the trial court's discovery order, an oral statement made by petitioner in 1977 in which he confessed an unrelated rape to law enforcement officials.

Petitioner argues that this information constituted evidence relevant to his propensity to confess to a crime even if he was actually innocent. Further, petitioner contends that the failure to disclose this information constitutes a denial of due process, in the context of a suppression hearing, analagous to a prosecutor's failure to disclose exculpatory evidence admissible in the guilt or punishment phase. See Brady v. Maryland, 373 U.S. 83 (1963). The Court is not persuaded.

First, the record reflects that defense counsel were provided with a copy of State's Exhibit 6, petitioner's confession to the Carpenter rape-murder, which contained the substance of petitioner's confession to the prior unrelated rape. This document was before counsel and the trial court prior to and during the confession suppression hearing, and it was in fact the focus of the hearing. This remains true even assuming that petitioner neither informed counsel of his previous confession nor had the mental capacity to do so,¹ and that defense counsel failed to elicit the information on its own. Counsel was armed with the substance of that previous confession in petitioner's signed statement of

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Petitioner contends that Penry's highest level of achievement was the ability to "prepare an egg" and perforce he was unable to provide this information to his defense counsel. This addresses the issue of competency. After a full and fair hearing a jury decided petitioner was competent to stand trial and assist in his defense. R. 7 at 944; Maggio v. Fulford, 462 U.S. 111, 117 (1983) (competency finding entitled to the presumption of correctness); see supra section I.

October 26, 1979, but did not present evidence or argue the "suggestibility" point in the Jackson v. Denno hearing. Therefore, the default of the State, if any, in failing to comply with the discovery order was not of the magnitude of a denial of due process.

Even absent these facts the Court is of the opinion that petitioner's initial ground is meritless. Petitioner contends the State's failure to disclose a prior unrelated confession deprived him of a full and fair suppression hearing because the undisclosed information was relevant to petitioner's propensity to confess to acts which he did not commit. He argues that under Brady, this failure to disclose information rendered the suppression hearing constitutionally infirm.

Brady stands for the proposition that the prosecutor's suppression of evidence favorable to an accused violates due process when the evidence is material either to guilt or punishment, irrespective of the good faith of the prosecutor. Brady, 373 U.S. at 87; Matheson v. King, 751 F.2d 1432 (5th Cir. 1985), cert. denied, 106 S.Ct. 1798 (1986). Petitioner's own argument negates his position on the Brady issue. The materiality of the prior statements, if any, goes to the issue of voluntariness, not guilt or punishment. Neither guilt nor punishment was before the trial court in the Jackson v. Denno pre-trial suppression hearing. This Court finds no reason or authority supporting petitioner's position for extrapolating the

protections of Brady to the pre-trial suppression hearing. Brady guarantees that a defendant will not be judged guilty without access to exculpatory evidence that the prosecutor has in his possession but that is unknown to the defendant. Having stated the rule, its inapplicability in this context cannot be more clearly demonstrated. The prior confession is neither exculpatory of the crime under investigation nor is it information unknown to the defendant. Petitioner's reliance on Brady and United States v. Agurs, 427 U.S. 97 (1976) (duty to disclose Brady material pursuant to a general request) is misplaced.

c. Testimony of Deputy Sheriff Nelson

Petitioner's second ground assaults the suppression hearing testimony of Deputy Sheriff Billy Ray Nelson. R. 4 at 136-159. Petitioner alleges that Nelson failed to testify to the whole truth at the suppression hearing and as a result left the false impression with the trial court that petitioner was not under arrest at the time of petitioner's first oral confession. Petitioner's sole basis for this claim is found in the alleged discrepancies in Nelson's testimony cited by petitioner. See R. Vol. 4 at 141 and 163, R. Vol. 14 at 1625-28 and 1621-22.

After an examination of the relevant testimony the Court finds no basis for an inference that Nelson testified falsely other than petitioner's conclusory allegations. To the extent that petitioner perceives discrepancy in the testimony offered by Nelson there are no allegations to raise a fact issue of whether the testimony was knowingly given falsely or that the

testimony was material to any decision rendered by the trial court. See e.g. Giglio v. United States, 405 U.S. 150 (1972); Williams v. Griswald, 743 F.2d 1533 (5th Cir. 1984). In light of the counsel's opportunity to attack Nelson's credibility by further cross-examination and the total record in the suppression hearing, the Court is unable to find that petitioner was denied a full and fair hearing based on the discrepancy of testimony, if any, by Nelson. Again, Petitioner's reliance on United States v. Agurs, 427 U.S. 97 (1976) is misplaced and this ground of relief is without merit.

d. Petitioner as the focus of the investigation

Petitioner states that at the suppression hearing "[t]he most important issue ... was when exactly petitioner was effectively under arrest." R. Vol. 12, at 1595-96. Petitioner argues that he was denied a full and fair hearing because District Attorney Price failed to disclose that after his initial encounter with petitioner his investigation had focused on petitioner and the prosecutor knew Penry would be on trial for the offense. Petitioner contends that this proves he was under arrest from the moment he first met with Price. This contention was decided adversely to petitioner by the trial court, R. Vol. 4 at 270, in the suppression hearing and subsequently affirmed by the Texas Court of Criminal Appeals. Penry, 691 S.W.2d 645-46. Even if it was true that petitioner was the focus of the criminal investigation, it is irrelevant to the question of whether he received a full and fair suppression

hearing. The trial court properly held a hearing to determine whether the acts of law enforcement officers in obtaining the petitioner's confession were in accordance with accepted constitutional limitations on criminal procedure. If their acts were found to be within constitutional bounds, the confessions would be admissible in the prosecution of this case. Of course, if they acted beyond the bounds of accepted constitutional law then the confessions must be excluded from evidence.

In addressing the precise issue raised as a ground for habeas corpus relief the question is not, as petitioner has framed it, whether criminal investigators acted within permissible constitutional standards, but whether the trial court afforded petitioner a full and fair opportunity to challenge the constitutionality of their conduct. From this perspective, it is irrelevant whether petitioner was in fact the focus of the investigation or whether he was informed of this fact. The trial court determined following a full and fair hearing consisting of testimony and argument of counsel that petitioner was not in custody when he made his first inculpatory statement to officers and that all oral and written statements were given freely and voluntarily. There is nothing in the record before the Court to indicate that petitioner was denied a full and fair opportunity to challenge official conduct with regard to his investigation.

e. Investigator expenses

Finally, petitioner contends that he was denied a full and fair suppression hearing because the trial court allowed only

\$500.00 for payment of investigation fees and denied petitioner's request for an amount of up to \$3,000.00. Tr. 33. See Tex. Code Crim. Proc. Ann. art. 26.05 (Vernon 1981). The Court is unable to find error of constitutional magnitude in the trial court's action. Tr. 63 & Tr. 7.

Petitioner argues that unspecified testimony was given at petitioner's trial and that this testimony was material to the issue of suppression and would have been discovered but for the denial of additional funds. These conclusory statements are unsupported by factual allegations, identification of the evidence, demonstration of its materiality, or a showing of prejudice to the petitioner. As such, they do not raise a constitutional issue. Mayberry v. Davis, 608 F.2d 1076 (5th Cir. 1979); Schlang v. Heard, 691 F.2d 796 (5th Cir. 1982).

Second, no record was made in the trial court of petitioner's particular need for the funds or the harm he would suffer by their denial. The investigator stated that he was aware of the listed witnesses, had seen the offense report, and was provided with copies of the witness' statements (with the exception of petitioner's family members). When asked about the scope of the investigation, his reply was to investigate whatever was asked of him. See R. Vol. 3 at 66-69. This Court cannot find an abuse of discretion under state standards, see e.g. Phillips v. State of Texas, 701 S.W.2d 875, 894-95 (Tex.

Cr. App. 1985), and more importantly cannot find an error that renders the hearing or trial so fundamentally unfair that rise to a due process violation, for which the writ will issue. Banzavechia v. Wainwright, 658 F.2d 337, 340 (5th Cir. 1981).

In conclusion, petitioner has not shown that an exception to the § 2254(d) presumption of correctness is applicable. Therefore, this Court would not be justified in disregarding the presumption of correction that clothes the trial court's findings on historical facts. Such a showing is a prerequisite to an evidentiary hearing in this Court or rehearing on the voluntariness issue in state court. Further, petitioner has alleged facts stemming from the pre-trial hearing that, if true, would establish that petitioner had been deprived of constitutional rights by use of an involuntary confession. Procunier v. Atchley, 400 U.S. 446, 454 (1971). Petitioner has not been denied due process when he has been given the opportunity to confront the state's witnesses with the aid of competent counsel, hear the State's evidence, present his own evidence, and to offer argument of the trial court in support of his position. The fundamental requisite of due process is an opportunity to be heard. Ford v. Wainwright, 106 S.Ct. 2595 (1986). The record fully supports the conclusions that the Jackson v. Denno hearing provided petitioner with that opportunity and that no constitutional error infected the proceeding.

III. CONFESSIONS

For the purposes of this application for habeas corpus, the relevant facts are as follows. 28 U.S.C. § 2254(d). On the morning of October 25, 1979, Billy Ray Nelson and Bob Grissom, deputies of the Polk County Sheriff's Department were on patrol in Livingston, Texas. At that time, they received a radio transmission from the department dispatcher concerning a stabbing and possible rape of a woman in Livingston. The radio report included a general description of the assailant.

Deputy Nelson knew that petitioner had recently been paroled from the Texas Department of Corrections on a rape conviction and knew that petitioner fit the description of the assailant. At that time, petitioner was living with his father in Livingston. Around 11:00 A.M., the deputies drove to the home of petitioner's father to determine if petitioner was there and if he knew anything about the crime. Upon finding him at home, the officers asked petitioner if he would accompany them to the police station to answer a few questions. Petitioner agreed to go with the men, but requested that he be allowed to put on a shirt first. The officers agreed and then drove petitioner to the police station.

Upon arrival, Officer Nelson noticed a blood stain soaking through the back of petitioner's shirt. Petitioner explained that he had been injured in a bicycle accident earlier in the day and displayed a puncture wound on his shoulder blade. Since the shirt petitioner was wearing did not have a hole in the back, Officer Nelson asked if he could see the shirt worn at the

time of the injury. Petitioner agreed and after Miranda warnings were read and waived petitioner signed a consent to search form for the shirt. The consent was given at 12:10 P.M. and witnessed by Ted Everitt, an investigator for the district attorney and Deputy Grissom.

Petitioner accompanied the men back to his father's house and retrieved a western-style shirt and undershirt for them. The shirts were marked with puncture holes corresponding to the wounds on petitioner's back.

At this time, the officers asked petitioner if he would be willing to accompany them to the scene of the crime. Petitioner agreed, and voluntarily accompanied them to the Carpenter home. Upon arrival at the scene, the patrol car was parked in front and petitioner remained in the back seat with the back door open. Deputies Nelson and Grissom were with him at times and, periodically, walked around the house and patrol car. The district attorney and his investigator were in the house.

After about forty-five minutes, petitioner voluntarily made the statement to the deputies that he wanted to talk and tell the truth. After being warned, petitioner made an oral confession to the officers of the attack on Pam Carpenter. Petitioner's statements were not induced by interrogation, threats, or coercion.

Deputy Nelson reported the statement to the district attorney and petitioner was brought into the Carpenter home where he was able to identify his pocket knife, the scissors

used to stab Pamela Carpenter, and the room in the house where the stabbing occurred. Petitioner was then taken to the Livingston Police Department and formally charged with capital murder. At approximately 2:45 P.M. petitioner was taken before Justice of the Peace Galloway in Livingston, given the magistrate's warning, and informed that he was charged with capital murder. During this appearance before Judge Galloway, petitioner's father was present and cautioned petitioner not sign waiver form. Petitioner's father then read petitioner his rights until he finally asked petitioner if he committed the crime. When petitioner responded affirmatively, his father left in anger.

Chief Smith then asked petitioner if he would be willing to give a statement, to which petitioner agreed. At about 3:25 P.M. petitioner was again warned and then proceeded to give an oral statement to Chief Smith. Chief Smith took down the statement and had it typed. The typed statement was read to petitioner in its entirety to make sure he understood it and had no questions. Two civilian witnesses were brought in off the street and again, the entire statement and warnings were read back to petitioner in the presence of the witnesses. Petitioner agreed that it was correct, made no changes when given the opportunity, then signed the document in the presence of the witnesses. This first statement confessed the crime of aggravated rape. Penry 691 S.W.2d at 642.

On October 26, 1979, a second statement was taken by Texas Ranger Maurice Cook. Petitioner was again warned of his rights prior to the statement. Cook not only read the warnings but explained them in detail to insure petitioner's understanding. After full explanation, Cook was satisfied that petitioner knew and understood his right to remain silent, to have a lawyer present during questioning, that he could have a lawyer appointed if he could not afford one, and the right to end the statement at any time. Petitioner then gave a more historically detailed oral statement, although the facts surrounding the rape and stabbing of Pamela Carpenter were relatively the same. The statement was typed from Ranger Cook's notes taken during petitioner's oral statement. The typed copy was then read to petitioner in its entirety in the presence of two civilian witnesses. At the conclusion, petitioner asked to make one handwritten addition to the statement which was done. Petitioner signed and initialled the document. At no time during the interrogation was petitioner subjected to threats, duress, promises of leniency, or any form of official coercion. At no time did he invoke his right to remain silent or express a desire to have a lawyer present or to terminate the interview. There is no evidence in the record that the second confession was taken merely for the purposes of enhancing punishment or securing the death penalty. The second written confession also constitutes an admission of aggravated rape. Penry, 641 S.W.2d at 642.

Petitioner filed a motion to suppress the two statements. After a full and fair pre-trial Jackson v. Denno hearing the trial court denied the motion to suppress and held the confessions admissible into evidence.

Petitioner argues that the trial court's decision to admit into evidence the statement made by petitioner to Chief Smith on October 25, 1979, and the statement made to Texas Ranger Cook on October 26, 1979, was unlawful for the following reasons: (1) the confessions were the fruit of an illegal arrest; (2) the officers did not use petitioner's exact words in writing the statements; and (3) both statements were made without petitioner's knowing relinquishment of the right to remain silent. Each argument is discussed briefly below.

1. Fruit of an illegal arrest

Petitioner contends that at the time of his initial oral confession to Deputies Nelson and Grissom that he was under arrest without probable cause. Petitioner premises this conclusion on the assumption that from the moment he left his father's house with the deputies he was under arrest. The state concedes probable cause for his arrest did not exist until he made the inculpatory statements in front of the Carpenter house. Therefore, the two confessions that followed the fourth amendment violation are "tainted fruit of the poisonous tree" and must be suppressed. Wong Sun v. United States, 371 U.S. 471 (1963).

The state contends that Stone v. Powell, 428 U.S. 465 (1976) controls and petitioner's fourth amendment claims are not reviewable in this Court on application for habeas corpus. Stone held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at this trial." Id. at 494 (footnotes omitted). See also Caver v. Alabama, 577 F.2d 1188, 1191-92 (5th Cir. 1978).

The trial court found, and the state concedes, that the petitioner was not under arrest prior to his initial oral confession. Even assuming that finding is incorrect, and that petitioner was under arrest illegally, does not change the fact that petitioner had a full and fair opportunity to litigate his fourth amendment claims in the trial court, R. Vol. 4 at 270-71, and on direct appeal. See Penry, 636 S.W.2d 645. Williams v. Brown, 609 F.2d 216-219-20 (5th Cir. 1980) (bar applies even if state court decided issue incorrectly.)

The trial court record fully supports the conclusion that the fourth amendment theory was raised before the trial judge, and that the Texas Court of Criminal Appeals considered and rejected this theory. Penry, 691 S.W.2d at 644 and 646. No factual allegations have been made that petitioner was denied a full and fair opportunity "to litigate a claim arising out of a putatively illegal search and seizure." Billiot v. Maggio, 694

F.2d 98 (5th Cir. 1982). Federal review on habeas corpus is thereby foreclosed. Wicker v. McCotter, 783 F.2d 487, 498 (5th Cir. 1986), cert. denied, 106 S.Ct. 3310 (1986); Billiot, 694 F.2d at 695.

2. Failure to use petitioner's exact words

Petitioner contends that his statements to Texas Ranger Cook and to Chief Smith should have been suppressed because neither Cook nor Smith used petitioner's exact words in writing the statement. The State argues that petitioner failed to object to the admission of the confessions on this specific ground and, therefore, has waived direct or collateral review for failure to comply with Texas contemporaneous objection rule. Alternatively, the State argues the record clearly supports the conclusion that the content of the statement was not altered by the officers taking down the statement.

Petitioner's response is that the contemporaneous objection rule was satisfied by the Motion to Suppress, Tr. 74, which states that "[a]ll statements of the Defendant ... were obtained illegally, in violation of Defendant's rights conferred by the Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution"

During the pre-trial Jackson v. Denno hearing, petitioner's counsel did not question Chief Smith about the exact wording of State's Exhibit 4, the October 25, 1979, statement. However, Maurice Cook was cross-examined about the wording of petitioner's second statement given on October 26, 1979. R. Vol. 4 at 227-28. The statements were admitted into evidence

for purposes of the suppression hearing without objection. R. Vol. 4 at 201, 237.

During the guilt phase of the trial the first statement, State's Exhibit 47, was admitted over the following defense objections: (1) renewal of all objections in the motion to suppress; (2) the statement does not comply with Tex. Code Crim. Proc., Ann. art. 38.22; (3) the statement was involuntary; (4) the statement was "fruit of the poisonous tree"; and (5) admission violates Miranda and Atwell v. United States, 398 F.2d 407 (5th Cir. 1968). No specific objection was raised concerning the exact wording of the statement. R. Vol. 15 at 1894 and 1867. All objections were overruled.

State's Exhibit 48-S, the second statement given by petitioner and taken by Ranger Cook, was admitted into evidence over the following objections: (1) the second statement was the fruit of a prior illegal statement; (2) the statement was involuntary; (3) the statement does not comply with Tex. Code Crim. Proc. Ann. art. 38.22; and (4) its admission into evidence violates Miranda and Atwell. All objections were overruled.

Finally, in the punishment phase State's Exhibit 48-S-2, a redacted version of the second statement, was admitted over the defendant's general objection that was "heretofore stated in the suppression hearing and main trial." R. Vol. XVII at 2603-2608.

The record is clear that defense counsel did not raise the specific objection that petitioner's statements were inadmissible because they were not verbatim transcriptions. Further, petitioner did not raise the issue as a ground of error

on direct appeal of his conviction, see Johnny Paul Penry v. State, Brief for Appellant, p. 2-5, but did so for the first time in his application for habeas corpus, Ex parte Johnny Paul Penry, Application for Writ of Habeas Corpus to the 258th Judicial District Court, p. 2.

Respondent now argues procedural default. Wainwright v. Sykes, 433 U.S. 72 (1977); Engle v. Isaac, 456 U.S. 107 (1982). Because the state court did not specify whether habeas relief was denied on the merits or due to procedural default, this Court is left to make the determination from the stipulated record. See generally O'Bryan v. Estelle, 714 F.2d 365, 383-85 (5th Cir. 1983); Preston v. Maggio, 705 F.2d 113 (5th Cir. 1983).

In making that determination the district court is directed to consider

[w]hether the court has used procedural default in similar cases to preclude review of the claim's merits, whether the history of the case would suggest that the state court was aware of the procedural default, and whether the state court's opinions suggest reliance upon procedural grounds or a determination of the merits.

O'Bryan, 714 F.2d at 384 (quoting Preston).

The Texas cases reveal that "when the objection raised at trial is not the same as that urged on appeal, the complaint is not properly preserved for review." Guzmon v. State, 697 S.W.2d 404 (Tex. Cr. App. 1985) (citations omitted). Buxton v. State, 699 S.W.2d 212 (Tex. Cr. App. 1985), clearly states that if the error raised on appeal does not comport with the trial objection, no error was preserved. Id. at 217.

Second, this procedural error was clearly pointed out to the state court by respondents in their response to the application for habeas corpus. See Respondent's Original Answer to Petitioner's Application for Writ of Habeas Corpus to the 258th Judicial District Court, par. III(6). Therefore, it is reasonable to conclude that the state court was aware of the procedural default.

Petitioner offers no "cause" to excuse the failure to specifically object to the wording of the statements. He offers only that his Motion to Suppress raised all objections, therefore, no procedural default could follow. The Texas cases suggest to the contrary.

Based on the above discussion the Court is of the opinion that procedural default in the state courts, not justified by "cause" precludes review of the merits of petitioner's claim in this Court.

However, even absent procedural default, petitioner has not identified a single error or discrepancy attributable to the officers' conduct. His conclusory allegations and failure to state specific facts that, if true, would warrant habeas relief, do not properly raise a constitutional issue. Schlang, supra.

3. Right to remain silent

a. Miranda and Voluntariness

Petitioner contends, in grounds for relief 13 and 14, that his statements of October 25, 1979, to Chief Smith and October 26, 1979, to Ranger Cook should have been suppressed by the trial court because they were made without a knowing relinquishment of petitioner's right to remain silent in

violation of Miranda v. Arizona, 384 U.S. 436 (1966). However, a fair reading of the arguments supporting these grounds for relief requires this Court to address not only the issue of validity of the waiver of petitioners Miranda rights which are grounded in the Fifth Amendment and made applicable to the states through the fourteenth amendment, Malloy v. Hogan, 378 U.S. 1 (1964), but also the issue of the voluntariness of the confessions themselves under a fourteenth amendment due process analysis. In support of the former argument, petitioner relies on Cooper v. Griffin, 455 F.2d 1142 (5th Cir. 1972); and in support of the latter he relies on Jurek v. Estelle, 623 F.2d 929 (5th Cir. 1980) (en banc), cert. denied, 450 U.S. 1001, 1014 (1981).

b. Miranda and the Two Confessions

The Supreme Court recently discussed the proper standard of review of a question concerning the validity of the waiver of a Miranda right in Moran v. Burbine:

Echoing the standard first articulated in Johnson v. Zerbst, 304 U.S. 458, 464 (1938), Miranda holds that "[t]he defendant may waive effectuation" of the rights conveyed in the warnings "provided the waiver is made voluntarily, knowingly and intelligently." 384 U.S. at 444, 475. The inquiry has two distinct dimensions. Edwards v. Arizona, supra, 451 U.S. at 482, Brewer v. Williams, 430 U.S. 387, 404 (1977). First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision of abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of

comprehension may a court properly conclude that the Miranda rights have been waived. Fare v. Michael C., 442 U.S. 707, 725 (1979). See also North Carolina v. Butler, 441 U.S. 369, 374-375 (1979)

106 S.Ct. 1135, 1141 (1986).

Applying the above standard to the present case, the Court has no difficulty in determining that petitioner received and waived multiple valid warnings during his brief detention prior to his two confessions and, further, that immediately prior to each confession, petitioner was warned and given explanations of the warnings and rights guaranteed him. The record reflects that prior to his first written statement, petitioner was warned no less than four times that he had a right to remain silent. Prior to the second confession, which was taken by Ranger Cook, petitioner was again given a complete set of warnings and an explanation of his rights.

Petitioner's waiver of his right to remain silent and concomitant decision to speak was voluntary in the sense that "it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Id. The evidentiary records from both the Jackson v. Denno hearing and the competency hearing are devoid of any evidence of overreaching by law enforcement to gain petitioner's confessions. See generally R. Vol. 4 at 136-271; R. Vol. 6 at 478-550. No evidence was ever offered that suggested petitioner was physically intimidated or psychologically coerced by the actions or techniques of his interrogatories, any representations or promises made by them or any other factor that would allow this Court to find that state coercion, rather than free choice,

prompted the confessions. Even petitioner's testimony negates any such inference. Petitioner affirmatively stated at his competency hearing that neither Chief Smith or Ranger Cook ever mistreated him or promised him anything. R. Vol. 6 at 534.

Second, the Court finds from the evidentiary record that petitioner's right to remain silent was waived with his awareness of his right and the consequence of the decision to abandon it. 106 S.Ct. at 1141. Petitioner testified that his rights were not only read but explained as well prior to his confessions. R. Vol. 6 at 535. This is consistent with the testimony of Chief Smith and Ranger Cook offered at the Jackson v. Denno hearing. He knew that he was charged with murder, R. Vol. 6 at 539, and what that meant. Contrary to petitioner's present contentions, the record demonstrates that he was aware of his right to remain silent in the face of questioning. Petitioner's testimony affirmed that Ranger Cook told him of his right to remain silent and added "what that means is you don't have to talk." R. Vol. 6 at 535.

Further, the record supports that with each set of warnings, petitioner was told that if he chose to talk, his statements could be used against him in a court of law. During the competency hearing, petitioner testified that he knew what that meant. Whether he understood the full extent the statements could be used and the possible ramifications of each use is not in this record. However, that level of understanding is not required to make a valid waiver of Miranda.

In Oregon v. Elstad, 105 S.Ct. 1285 (1985) the Supreme Court stated:

This Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness. . . . Thus we have not held that the sine qua non for a knowing and voluntary waiver of the right to remain silent is a full and complete appreciation of all the consequences flowing from the nature and quality of the evidence in the case.

Id. at 1297-98. It is sufficient in the opinion of this Court that petitioner knew and understood that as a consequence of abandoning his right to remain silent that statements made by him could be used to secure his conviction and punishment for the offenses charged. Miranda, 384 U.S. at 469.

After independent review of the evidentiary record, the Court is of the opinion the totality of the circumstances demonstrates both an uncoerced decision and an appreciation of its possible consequences by petitioner, and that he was competent to make such a choice. Therefore, the Court is not persuaded that the totality of the circumstances affecting petitioner produced a waiver of the right to remain silent that was involuntary.

c. Due process and the Two Confessions

The trial court determined after a full and fair Jackson v. Denno hearing that the confessions of October 25 and October 26 were made voluntarily. While the underlying factual findings that support that legal conclusion are entitled to a presumption of correctness, 28 U.S.C. § 2254(d), the ultimate conclusion of

"voluntariness" is subject to plenary review in the federal court. Miller v. Fenton, 106 S.Ct. 445, 450 (1986).

Petitioner contends that his confessions to Chief Smith and Ranger Cook were not voluntary for the following reasons: (1) petitioner was susceptible to pressure; (2) petitioner was not told that his confessions could be used by the State to seek the death penalty; (3) the statements are highly suspect because they were typed from the notes of the officers rather than verbatim transcriptions of petitioner's actual words; and (4) with respect to the second confession only, that it was taken "for prosecutorial purposes in their drive for the death penalty," because it elicited facts that made petitioner's conduct look more deliberate and likely to continue. See Petitioner's Amended Application for Writ of Habeas Corpus, pp. 44-45.

Prior to Miranda the voluntariness of a confession of a suspect was measured against the requirements of the Fourteenth Amendment Due Process Clause. Statements "obtained by techniques and methods offensive to due process," Haynes v. Washington, 373 U.S. 503, 515 (1963), or under circumstances in which the suspect clearly had no opportunity to exercise "a free and unconstrained will," id. at 514 were inadmissible. See Oregon v. Elstad, 105 S.Ct. 1285 (1985). Once past the Miranda issue, discussed supra, "the primary criterion of admissibility [remains] the 'old' due process voluntariness test." Elstad,

105 S.Ct. at 1293, quoting Schulhofer, Confessions and the Court, 79 Mich. L. Rev. 865, 877 (1981).

The Fifth Circuit in Jurek v. Estelle, 623 F.2d 929, 937 (5th Cir. 1980), cert. denied, 450 U.S. 1001, 1014 (1981) held:

[I]n order to find [the defendant's] confession voluntary, we must conclude that he made an independent and informed choice of his own free will, possessing the capability to do so, his will not being overborne by the pressures and circumstances swirling around him.

More recently, the Supreme Court addressed the issues of free will, voluntariness and due process in Colorado v. Connelly, 55 U.S.L.W. 4043 (1986), and held that "absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." Id. at 4045. The Court went on to hold that "coercive police conduct is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of Due Process of the Fourteenth Amendment." Id. at 4046, and rejected the contention that mental or psychological pressures alone would invalidate an otherwise valid confession.

In this collateral proceeding, the burden of proving involuntariness rests with the habeas corpus applicant. See Jurek, 623 F.2d at 937; Bruce v. Estelle, 536 F.2d 1051, 1058-59 (5th Cir. 1976), cert. denied, 429 U.S. 1053 (1977). With regard to both confessions, the Court is of the opinion that after independent review of the record, the Jackson v. Denno hearing, the competency hearing, and totality of the

circumstances that petitioner has not demonstrated a denial of due process.

"The determination of voluntariness of a confession requires the Court to consider the 'totality of the circumstances - both the characteristics of the accused and the details of the interrogation.'" U. S. v. Gorden, 638 F.Supp. 1120 (W.D. La. 1986) quoting Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

At the time, petitioner was a young and physically healthy man. It is conceded by the state that petitioner is a man of limited mental abilities. Both his lack of education, Payne v. Arkansas, 356 U.S. 560 (1958), and low intelligence, Fikes v. Alabama, 352 U.S. 191 (1957) are characteristics that must be considered in this case. The record reflects that law enforcement officials that dealt with petitioner were aware of his limited capabilities, but rather than exploit his deficiencies, attempted to compensate for them. No evidence was offered that interrogators exploited petitioner's limited mental abilities to deceive petitioner, minimize his crime, or break his psychological resistance with unreasonable or improper interrogation techniques or surroundings. All evidence points to the contrary.

Second, there is no evidence that petitioner's immediate environment generated a psychological coercion to bend or break his will to resist interrogation. There has been no allegation that the time, place, or manner of questioning was inherently coercive. Both confessions were taken within a span of two

days. Petitioner spoke with and was cautioned by his father at the appearance before Justice of the Peace Galloway. Petitioner never requested the assistance of a lawyer. The questioning sessions were not unduly long, and the evidence tended to show they were interrupted rather than continuous.

The Elstad decision concedes that criminal suspects may be susceptible to various pressures that may ultimately yield a confession. But if the source of the coercion or pressure calculated to break the suspect's will does not emanate from law enforcement, then no Fourteenth Amendment rights have not been abridged. Id. at 1291. In other words, if a confession flows merely from a suspect's choice to tell the truth, to clear his conscience or even to minimize his culpability, due process is not offended.

Petitioner's next point is that he could not have made a voluntary confession without knowledge that the State could use the information to seek the death penalty. Miranda makes clear that the warning of a defendant of his constitutional right to remain silent serves two purposes. First, the warning is given to inform a possibly unknowing person of his right and to assure him that it will be honored. Second, the warning must be followed with an explanation that "anything said can and will be used against the individual in court." Miranda, 384 U.S. at 469. This admonition is not given to advise the suspect of the possible range of fines and penalties he may suffer upon a subsequent conviction, but rather is to bring home to a suspect an awareness of the consequence of speaking and that "he is

faced with a phase of the adversary system - that he is not in the presence of persons acting solely in his interest." Id.

As noted previously, the Supreme Court "... has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness." 105 S.Ct. at 1297; or "that the sine qua non for a knowing and voluntary waiver of the right to remain silent is a full and complete appreciation of all the consequences flowing from the nature and quality of the evidence in the case." 105 S.Ct. 1297-98. Although spoken in the context of Miranda waiver, it is equally applicable here. "There is obviously no reason to require more in the way of a 'voluntariness' inquiry in the Miranda waiver context than in the Fourteenth Amendment context." Connelly, 55 U.S.L.W. at 4047.

In Connelly, Justice Stevens concluded that where defendant was incompetent to stand trial he was not competent to waive his right to remain silent. Id. 4047-48 (Stevens, J. concurring in part and dissenting in part). Accepting his premise, then surely the converse must follow, that where an accused is found competent to stand trial, he must at a minimum have the capability to waive a constitutional right, even though an actual finding of waiver requires evaluation of additional circumstances. Justice Stevens continues, "the mere absence of police misconduct does not establish that the suspect has made a free and deliberate choice when the suspect is not competent to stand trial." Id. at 4048 n. 5. In this case, where a jury has

found petitioner competent plus the absence of any evidence of police misconduct strengthens this Court's conviction that the right to remain silent was validly waived. See Reddix v. Thigpen, 805 F.2d 506, 516 (5th Cir. 1986).

Finally, petitioner contends that the October 26 confession was involuntary because it was taken as part of a prosecutorial drive for the death penalty. Even if that allegation, though factually unsupported in the record, were true, an improper prosecutorial motivation alone would be insufficient to vitiate the voluntariness of petitioner's consent, but would merely be a factor to be considered when evaluating the impact of the totality of the circumstances on petitioner's exercise of free will. See Jurek, 623 F.2d at 941, n. 7 (the totality of factors relevant to the disposition of Jurek case).

In this case, the Court finds the existence of a second confession to be of minimal probative value on the issue of voluntariness. First, the undisputed evidence is that the second confession was taken by Ranger Cook without having read petitioner's initial confession and with minimal briefing from District Attorney Price. Price testified that he did not suggest specific areas of interrogation for Cook to develop. Second, the testimony was not controverted that the confession of October 26 was taken to develop the case factually with new information. Third, as distinguished from Jurek, the initial confession in this case was sufficient to allow prosecutors to seek the death penalty. This case differs vastly from Jurek, supra, where prosecutors acted essentially on a prosecutorial

"hunch" to take another confession and extract statements that would turn a murder case into a capital murder case. Fourth, there is fair support in the record that petitioner was mentally capable of making the statements. 28 U.S.C. § 2254(d)(8). Finally, there is no evidence in this record to raise the issue that prosecutors relied upon petitioner's suggestibility by pursuing a specific object during their interrogation and relenting only when they attained a confession to capital murder. Evidence of this character would be probative of official overreaching designed to overbear petitioner's free will and probative of involuntariness. But, other than petitioner's conclusory allegations of prosecutorial misconduct, there is no such evidence in the record and none before this Court. The absence of improper motivation by officers supports this Court's conclusion that under the totality of the circumstances these confessions cannot be deemed involuntary. Petitioner's arguments to the contrary are not persuasive.

IV. JURY VOIR DIRE

Petitioner argues that his jury was conviction prone because seven of the state's challenges for cause were granted by the Court, thus excluding people opposed to the death penalty. The former Witherspoon rule allowed trial courts to excuse jurors so opposed to the death penalty that they would automatically vote against such a sentence. Witherspoon v. Illinois, 391 U.S. 510 (1968). This rule was modified by the Supreme Court in 1985. See Wainwright v. Witt, 105 S.Ct. 844

(1985). Before constitutionally excusing jurors challenged for cause on Witherspoon grounds, trial courts now must be satisfied that the prospective juror's views concerning capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Id. at 852. A trial court's granting of a challenge for cause on this ground is a factual finding entitled to a presumption of correctness under 28 U.S.C. § 2254(d). Darden v. Wainwright, 106 S.Ct. 2464, 2469 (1986) (citing Witt).

Petitioner concedes that six of the seven jurors excused for cause in this case admitted they could not vote for the death sentence, meaning they qualified for exclusion even under the narrower Witherspoon test. See R. Vol. 7 at 200-215 (Edna R. Williams); Vol. 9 at 488-499 (Priscilla Smith); Vol. 9 at 587-595 (Mrs. Buford Mills); Vol. 11 at 970-976 (Battie Deason); Vol. 11 at 997-1000 (Billie Jones); and Vol. 11 at 1050-1071 (Ernestine Lee). The seventh was excused after testifying that he would be unable to answer a question asking about petitioner's future behavior, since no one can say what a person might do in the future. See R. Vol. 11 at 888-913, 897 (Elmer Thompson). This is one of the three questions jurors must answer during the sentencing phase of a capital case in Texas.

Neither Witherspoon nor Witt seem to apply to Elmer Thompson because he was not excused because of his views on capital punishment, but because of his views on the uncertain nature of the future. By the same token, petitioner is unable

to demonstrate any error which resulted from Elmer Thompson's dismissal, other than a possible argument that the jury was made more conviction prone in his absence, and in the absence of the other six excused jurors.

The conviction prone theory has been squarely rejected by the Supreme Court, however. Lockhart v. McCree, 106 S.Ct. 1758 (1986). The sixth amendment guarantees defendants a right to a jury that will "conscientiously apply the law and finds the facts." Id. at 1767, citing Witt, 105 S.Ct. at 852. As long as this requirement is met, the state may "death qualify" juries in capital cases according to the standard set out in Witt.

Welcome v. Blackburn, 793 F.2d 672 (5th Cir. 1986).

Even assuming petitioner's conviction prone jury argument had not been rejected, no error exists. Petitioner failed to object to the challenges for cause at trial, and has failed to show cause for his failure and prejudice resulting from the trial court's action. Engle v. Isaac, 456 U.S. 107, 129 (1982); Wainwright v. Sykes, 433 U.S. 72, 86-7 (1977). In addition, the state had six peremptory challenges which it did not use, meaning only one of the seven jurors need have been excused properly. In fact, all were properly excused, and petitioner's challenge to the jury fails to state an adequate ground for relief. This contention is therefore DENIED.

V. ALLEGED TRIAL ERRORS

Petitioner raises two grounds for relief related to activities at his trial. First, he alleges that the trial

court's failure to sua sponte order a Computerized Axial Tomography (CAT) Scan of petitioner's brain constituted a denial of equal protection. Second, he asserts that the trial court should have declared a mistrial when, during the punishment phase, a witness called to testify concerning a prior rape attempt failed to identify petitioner as the culprit.

The first allegation presents a novel argument. A psychiatrist called by petitioner on the issue of insanity testified that a CAT Scan would enable a doctor to determine whether petitioner had suffered any organic brain damage as a child which resulted in retardation. R. Vol. 16 at 2201. It is undisputed that defense counsel made no request for these tests to be performed. Petitioner cites authority for the proposition that competency to stand trial is a continuing issue, and insanity should be treated in the same manner. See Pride v. Estelle, 649 F.2d 324 (5th Cir. 1981). Petitioner concludes that it was incumbent upon the trial court to order further tests which could have helped decide the issue of petitioner's sanity, and his failure to do so constituted unlawful differential treatment of potentially insane defendants as opposed to potentially incompetent defendants.

The Pride case does not address the duties of trial courts to order testing on their own motion, however. Rather, it requires a federal habeas petitioner to prove by clear and convincing evidence facts which positively, unequivocally and clearly generate a real, substantial and legitimate doubt

concerning petitioner's competency to stand trial. Id. at 326; Johnson v. Estelle, 704 F.2d 232, 237-8 (5th Cir. 1983).

Assuming petitioner is correct in asserting that this standard should be applied equally to insanity defenses, the burden has not been satisfied.

The record reflects a lengthy competency hearing and subsequent trial. The issue of insanity was raised at both. A jury heard extensive testimony from both sides concerning the possibility of organic brain damage. The jury rejected it as a factor precluding competency to stand trial, and later rejected it as a factor supporting an insanity defense. After examining the record, this Court believes these conclusions are fairly supported and as such should not be disturbed. Maggio v. Fulford, 462 U.S. 111, 117 (1983).

As a practical matter, imposing a burden upon a trial court to order testing based on a mere mention by a witness, without more, would create intolerable and unwieldy delays. This is especially true in light of all the facts in this case. For example, there was testimony from a psychologist indicating that brain scans were still in a developmental state at the time of this trial. R. Vol. 7 at 802. Testimony at the competency hearing from a clinical psychologist called on petitioner's behalf indicated that any organic brain damage petitioner may have suffered took the form of underdevelopment, and could not be detected by any test, including a brain scan. R. Vol. 6 at 589-590. In this case, the trial judge had no duty to order on

his own motion an unproven and probably ineffective test which would have added nothing to the issue of petitioner's sanity.

Even assuming the strict Pride standard is inapplicable to proof of an insanity defense, this Court can intervene only if the State failed to provide petitioner "access to the raw materials integral to the building of an effective defense." Ake v. Oklahoma, 105 S.Ct. 1087, 1094 (1985). In applying this standard, Ake required the appointment of a psychiatrist to assist in the preparation of a potential insanity defense. Ample professional assistance, including a psychiatrist, was provided to this petitioner. Given the multitude of tests performed over a period of years and prior to the trial, and the number of doctors who have examined petitioner, this Court is wholly unpersuaded that the failure to perform an unrequested CAT Scan deprived petitioner of the essential tools with which to build his defense.

Petitioner's second complaint in this category concerns the testimony of Julia Armitage, the victim of an attempted rape in 1976. Petitioner contends that since she could not positively identify him as her assailant, her testimony during the punishment phase was so prejudicial that it constituted fundamental error.² Petitioner apparently advances this

² Petitioner cites U.S. v. Garber, 471 F.2d. 212, 217 (5th Cir. 1972) to support his argument that no request for instruction was necessary in this case. Garber applied this standard, however, only in the context of fundamental or plain error as contemplated by Rule 52(b) of the Fed. Rules of Cr. Procedure.

argument in order to circumvent the Texas Court of Criminal Appeals' refusal to consider this point because the error was not properly preserved. See Penry, 691 S.W.2d 649-650.

Use of the fundamental error standard has been significantly restricted, however, and is available only in exceptional circumstances when necessary to avoid a miscarriage of justice. See, e.g., United States v. Frady, 456 U.S. 152, 163 (1972). For this reason, the fundamental error standard is inappropriate on collateral review of a criminal conviction which has been affirmed on direct appeal. Id. at 164. Petitioner must meet an even higher standard, which he has not done on this point.

Since resort to a fundamental error standard is not possible, this Court is left with the state court's finding that error was not properly preserved. Federal courts do not sit to review interpretations of state criminal law by the state's highest court. Seaton v. Procunier, 750 F.2d 366, 368 (5th Cir. 1985), cert. denied, 106 S.Ct. 110 (1986). It is not this Court's function to disagree with the Court of Criminal Appeals and hold that error was properly preserved.

The effect of this is to change the standard to be used in resolving petitioner's claim. Since the state courts have determined that the manner of objection was insufficient,

petitioner must show cause for the insufficiency and prejudice from Armitage's testimony. Engle, 456 U.S. at 107.

No explanation is offered to show cause. By the same token, it is unlikely that any prejudice resulted. A confession from petitioner describing a rape attempt similar in many respects to Armitage's ordeal was admitted after her testimony. R. Vol. 17 at 2640-41. Petitioner's trial counsel made it very clear to the jury when cross-examining Armitage that she could not positively identify petitioner as her assailant. R. Vol. 17 at 2616, 2617. The jury therefore knew Penry may or may not have been the assailant, but also knew Penry had been the assailant in a similar crime at the same time in the same area. Finally, the Armitage testimony was only a small part of the proceedings during the punishment phase of petitioner's trial. Given all these factors, it is extremely unlikely that Armitage's testimony played a decisive role in the proceedings, meaning it could not have infected the entire trial with "error of constitutional dimensions" nor could refusal to consider it result in a "fundamental miscarriage of justice." Frady, 456 U.S. at 170, 172. Both grounds for relief asserted by petitioner based on alleged trial errors will be overruled.

VI. PUNISHMENT PHASE JURY CHARGE

Petitioner next contends that his sentence constitutes cruel and unusual punishment because of the trial court's failure to instruct the jury on how to weigh mitigating factors when answering the three issues submitted to them at the

punishment phase of a capital case. See Tex. Code Crim. Proc. Part. 37.071(b(1)-(3)) (Vernon Supp. 1986) (Pet. No. 8).

Petitioner advances the same argument with regard to the trial court's refusal to define "deliberately" as used in the first of these three issues. (Pet. No. 9).

Both arguments have been "squarely foreclosed." Evans v. McCotter, 790 F.2d 1232, 1243 (5th Cir. 1986). Texas trial courts need not specifically instruct jurors on how to balance mitigating and aggravating circumstances. Esquivel v. McCotter, 777 F.2d 956, 958 (5th Cir. 1985), cert. denied, 106 S.Ct. 1662 (1986); citing Zant v. Stephens, 462 U.S. 862 (1983). By the same token, Texas trial courts need not define the term

"deliberately" as used in the punishment phase charge. Cannon v. State, 691 S.W.2d 564, 578 (Tex. Crim. App. 1985), cert. denied, 106 S.Ct. 897 (1986); Russell v. State, 565 S.W.2d 771, 780 (Tex. Crim. App. 1983), cert. denied, 104 S.Ct. 1428 (1984).

In lieu of instructions, juries are allowed to use the common meanings attributed to words in the charge. Both prosecution and defense are free to argue the inferences they wish the jury to draw from the words used. See, e.g., Milton v. Procunier, 744 F.2d 1091, 1086 (5th Cir. 1984), cert. denied, 105 S.Ct. 2040 (1985). These two grounds of error will also be overruled.

CONCLUSION

The criminal courts of the State of Texas have convicted Johnny Paul Penry of capital murder and sentenced him to death. The duty of this federal court undertaking collateral review of

those decisions is to correct errors of constitutional magnitude, whether transgressions of enumerated rights or acts repugnant to fundamental principles of fairness and justness protected by the Due Process Clause of the fourteenth amendment. Ever mindful of that duty, petitioner's grounds for relief have been fully considered by the Court and, for the reasons stated above, rejected. It is therefore

ORDERED that Petitioner's First Amended Application for Writ of Habeas Corpus be, in all respects, DENIED. It is further

ORDERED that the Stay of Execution imposed by this Court on May 6, 1986, pending review of the petitioner's application is hereby DISSOLVED.

SIGNED this 25th day of April, 1987.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2466

JOHNNY PAUL PENRY,

Petitioner-Appellant, **U.S. COURT OF APPEALS
FILED**

versus

JAMES A. LYNAUGH, Director,
Texas Department of Corrections,

DEC 23 1987
GILBERT F. GANUCHEAU
CLERK

Respondent-Appellee.

Appeal from the United States District Court for
the Eastern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(December 23, 1987)

Before REAVLEY and GARWOOD, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Thomas M. Reavley
United States Circuit Judge

NOTICE
FILED FOR LOCAL
COURT FOR STAY OF THE
JUDGMENT

APPENDIX C

ORDER DENYING SUGGESTION
FOR REHEARING EN BANC